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IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-688

RALPH H. LITTLEJOHN, JR.,
Petitioner,

v.

SHELL OIL COMPANY, SOONER OIL COMPANY, AND AMERICAN OIL COMPANY,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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[1] Opinion by Circuit Judge Simpson, with Judge Wisdom concurring; Judge Coleman dissented.

[2] Majority opinion by Circuit Judge Bell, joined, in part, by Judges Clark, Gewin, Thornberry, Ingraham, Coleman and Roney; Chief Judge Brown and Judges Simpson, Wisdom, Godbold and Morgan dissented. Judges Goldberg, Ainsworth and Dyer disqualified themselves, and did not participate in the decision of the case.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Ralph H. Littlejohn, Jr., petitions for Writ of Certiorari to review the closely divided opinion of the Court of Appeals for the Fifth Circuit *En Banc*, which decision vacated the panel opinion by Judge Simpson and affirmed that part of the decision of the United States District Court, Northern District of Texas, which held the Robinson-Patman Act jurisdictional allegations contained in the Amended Complaint to be insufficient. The District Court granted summary judgment for all Defendants

based on defense affidavits and before Littlejohn was permitted to conduct discovery on the jurisdictional issues.

This case is predicated on and controlled by *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954), and the rationale therein expressed.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Texas, Dallas Division, entered on April 28, 1971, is reported at 326 F.Supp. 45. The panel opinion of the United States Court of Appeals, Fifth Circuit, entered on March 22, 1972, is reported at 456 F.2d 225. The Order of the United States Court of Appeals granting rehearing *En Banc* is reported at 470 F.2d 997. The Opinion of the Court of Appeals *En Banc*, entered on August 10, 1973, is reported at ..... F.2d ..... All opinions are included in the Appendices.

JURISDICTION

The District Court's jurisdiction was based on Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, Title 15, U.S.C., § 13(a) and Title 28, U.S.C., § 1331.

This petition is filed within the time permitted by law. The jurisdiction of the Supreme Court is based on Title 28, U.S.C., § 1254(1).

QUESTIONS PRESENTED

1. As in *Moore v. Mead's Fine Bread*, is the "purchases in commerce" jurisdictional requirement of the Robinson-Patman Act satisfied by a primary line competitor's uncontroverted allegation that Shell, American, and Sooner purposely used profits derived from their other interstate sales to finance and

support wholesale price discrimination in the sale by them of gasoline to some of their controlled, brand stations in Northeast Dallas.

2. Is the "purchases in commerce" statutory language synonymous with "interstate delivery of goods purchased", or does the phrase include all aspects of the consummated sale transaction, including financial support, rebates and discounts given by the seller to the buyer, so that jurisdiction is established by proof that the financial aspect of the sale transaction is "in commerce".

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

United States Constitution, Article 1, Section 8, Clause 3:

> The Congress shall have power . . . to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes . . .

Clayton Act, Section 2(a), as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, *where either or any of the purchases involved in such discrimination are in commerce*, where such commodities are sold for use, consumption, or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and *where the effect of such discrimination may be substantially to lessen competition* or tend to create a monopoly in any line of commerce, *or to injure, destroy, or prevent competition with any person who*

either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . [Emphasis added.]

STATEMENT OF THE CASE

Although there have been a number of cases that inferentially raised issues related to *Moore v. Mead's Fine Bread, supra,* since 1954, this is the first case directly predicated on the language used and the rationale apparent in this Court's unanimous decision, particularly the following holding, 348 U.S. at 119-120:

> We think that the practices in the present case are *also* included within the scope of the antitrust laws. We have here an interstate industry increasing its domain through outlawed competitive practices. The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him. But the beneficiary is an interstate business; *the treasury used to finance the warfare is drawn from interstate, as well as local sources* which include not only respondent but also a group of interlocked companies engaged in the same line of business; and the prices on the interstate sales, both by respondent and by the other Mead companies, are kept high while the local prices are lowered. If this method of competition were approved, the pattern for growth of monopoly would be simple. As long as the price warfare was strictly intrastate, interstate business would grow and expand with impunity at the expense of local merchants. The competitive advantage would then be with the interstate combines, not by reason of their skills or efficiency, but because of their strength and ability to wage price wars. The profits made in interstate activities would underwrite the losses of local price cutting campaigns. No instrumentality of interstate commerce

> would be used to destroy the local merchant and expand the domain of the combine. But the opportunities afforded by interstate commerce would be employed to injure local trade. Congress, as guardian of the Commerce Clause, certainly has the power to say that those advantages shall not attach to the privilege of doing interstate business. [Emphasis added; hereafter referred to as the quoted language in *Moore*.]

Littlejohn's Amended Complaint is in precise harmony with the above quoted language. The financing practice prohibited by *Moore, supra*, is the precise anticompetitive practice used by Shell, American and Sooner to bankrupt Littlejohn.

Littlejohn brought this action against his competitors, Shell, American and Sooner, under the Clayton Act, Section 2(a), as amended by the Robinson-Patman Act. Littlejohn, a distributor of independently produced gasoline, asserted that Shell, American and Sooner destroyed his competitive business by discriminatorily lowering the wholesale price of gasoline sold by them to their controlled Shell and American Brand retail outlets located adjacent to Littlejohn's retail outlet; that the controlled Shell and American Brand retail outlets knowingly received the benefit of such discrimination; and that Shell, American and Sooner used profits derived from their interstate sales to finance and subsidize directly the wholesale price discrimination — all of which resulted in the lowering of the retail price charged by the controlled Shell and American Brand retail outlets to a level that drove Littlejohn out of business.

The uncontroverted, Amended Complaint alleged:

> A. Each of the three Defendants, Shell Oil Company, American Oil Company and Sooner Oil Company, is engaged in marketing petroleum products in interstate commerce.

B. Both Shell Oil Company and American Oil Company produce oil and gas in several States of the United States; both of said Defendants own and operate refineries in several States of the United States and each markets the products from their respective refineries as well as products from refineries owned and operated by others in most of the States of the United States. Both Shell Oil Company and American Oil Company market their petroleum products in interstate commerce by selling wholesale to other marketers and by selling retail through service stations using the names "Shell Oil Company" and "American Oil Company", respectively. Defendants Shell Oil Company and American Oil Company are large participants in the larger interstate marketing of gasoline and other petroleum products.

The Amended Complaint alleged that starting in June 1970, and continuing until Littlejohn was forced out of business in August 1970, Shell, American and Sooner each sold its regular gasoline to its controlled service station adjacent to Littlejohn's at wholesale prices that were lower than each charged to its other service stations in the Northeast Dallas area. The adjacent service stations cut their retail price of gasoline and Littlejohn was no longer able to compete.

It was specifically alleged that Shell, American and Sooner purposely used profits derived from their interstate sales to finance and subsidize directly the lower wholesale prices. The uncontroverted, Amended Complaint provided:

> C. (1) Defendants American Oil Company and Sooner Oil Company sold regular gasoline to the American Oil Company service station at Forest Lane and Plano Road at a price lower than which each of them charged for regular gasoline at all other

American Oil Company service stations in the Northeast Dallas area during the period of which Plaintiff complains.

(2) Defendant Shell Oil Company sold regular gasoline to the Shell Oil Company service station at Forest Lane and Plano Road at a price lower than which each of them charged for regular gasoline at all other Shell Oil Company service stations in the Northeast Dallas area during the period of which Plaintiff complains.

D. The profits of Defendants Shell Oil Company, American Oil Company and Sooner Oil Company derived from their interstate operations were wrongfully used by each of them to sell gasoline at the American Oil Company service station at Forest Lane and Plano Road and at the Shell Oil Company service station at Forest Lane and Plano Road at a lower price than each was selling gasoline to any other American Oil Company or Shell Oil Company service station in the Northeast Dallas area. In particular, Defendants American Oil Company and Shell Oil Company used profits which each of them derives from the overall large interstate producing and marketing business of each of them.

Shell, American and Sooner filed Motions for Summary Judgment in the District Court asserting that the physical delivery of gasoline in the Dallas market was not made across State lines, and therefore moved to dismiss the Amended Complaint for lack of jurisdiction. Shell asserted that its gasoline was delivered to Dallas by pipeline from its refinery in Houston; American asserted that it "acquires" gasoline in Dallas and resells to Sooner, its jobber, in Dallas; Sooner said that it "accepts delivery" of gasoline from American in Dallas and

resells the gasoline to American's dealers in Dallas. No affidavits denied, in any way, that the wholesale price to dealers was artificially low; and, no affidavits denied that subsidies were given to finance the price war and eliminate Littlejohn as a competitor.

The District Court held that the Robinson-Patman Act required, as to either the specific or comparative sale, that the goods sold be physically delivered across State lines. The Court ruled that Section 2(a) was *not* satisfied by a showing that interstate derived profits were purposely used to finance and subsidize the local, discriminatory wholesale purchases.

The panel decision of the Court of Appeals reversed the District Court, holding:

> Until the Supreme Court explicitly repudiates the above quoted language from Mr. Justice Douglas' opinion in *Moore*, we believe that a Robinson-Patman Act plaintiff should be entitled to proceed upon a theory that the interstate operations of the defendant or defendants were used to "underwrite" local discriminatory pricing practices. Consequently, we hold that the District Court erred in granting the defendants' Motions for Summary Judgment before the plaintiff had been afforded the opportunity to utilize discovery to develop basic jurisdictional facts from data solely within the defendants' possession. [p. 31, *infra*].

A bare majority of the Court of Appeals *En Banc* disagreed with the panel decision, said that the quoted language in *Moore*, *supra*, was merely *dictum*, held that physical delivery of goods across State lines is required to satisfy the jurisdictional requirement of Section 2(a), and refused to follow *Moore*,

supra.[3] By so ruling, the Court of Appeals below improperly reduced the scope of the "purchases in commerce" statutory language to mean "interstate delivery of goods sold," and sanctioned the prior destruction of Littlejohn's competitive business.

To the extent that the Court below and other Courts of Appeals have refused to follow *Moore, supra,* they have declined to respect this Court's opinion and enforce the law of the land. As Chief Judge Brown said, in dissent in the Court *En Banc* below, the prior Fifth Circuit cases "are wrong and ought to be specifically overruled on the basis of *Moore.*" [p. 54, *infra*].

REASONS FOR GRANTING THE WRIT

1. This Court must restore, and restore now, the proper interpretation of the "in commerce" jurisdictional requirement of the Robinson-Patman Act, and the dignity of its decisions.

Seven of the fifteen members of the Court of Appeals below, citing other Courts of Appeals that have done likewise, disregarded this Court's clear holding in *Moore, supra.* Those Courts have exceeded their constitutional power, and, by so doing, have spawned a series of decisions antithetical to the Robinson-Patman Act. Also, those decisions have permitted Shell, American and Sooner to discriminate in price and to eliminate competition, without fear of prosecution.

The anticompetitive activity involved here is of national concern. A report recently published by the U. S. Senate, Antitrust and Monopoly Subcommittee, described the practice followed

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[3] Some other Circuits too have refused to follow *Moore, supra,* e.g., *Willard Dairy Corp v. National Dairy Prod. Corp.,* 309 F.2d 943 (6 Cir. 1962), *cert. denied,* 373 U.S. 934 (1963); *Cliff Food Stores, Inc. v. Kroger, Inc.,* 417 F.2d 203 (5 Cir. 1969); *Central Ice Cream Co. v. Golden Rod Ice Cream Co.,* 287 F.2d 265 (7 Cir. 1961); *Food Basket, Inc. v. Albertson's, Inc.,* 383 F.2d 785 (10 Cir. 1967).

by Shell, American and Sooner as an industry custom. The report said that the principal mechanism used to eliminate local competition is the artificial price increase in major, dominated and controlled gasoline markets, and the use of the additional profits to subsidize artificially lowered prices in the "war zone". U.S. Senate, *Report on Marketing Practices in the Gasoline Industry*, Part 3, 92nd Cong., 2d Sess., 277, 288-289 (Feb. 7, 8 and 9, 1972).

Consistent with the industry pattern, Shell, American and Sooner contrived an artificial delivery system to take advantage of the refusal of the lower Federal Courts to enforce fully the Robinson-Patman Act: As demonstrated in Littlejohn's Amended Complaint and Record, Shell, American and Sooner financed Littlejohn's destruction with interstate derived profits, but made sure that the actual delivery of gasoline to their Brand stations was made over intrastate pipelines or from local storage tanks.

Although the gasoline was produced or refined elsewhere, and always predestined for the Dallas market, and Littlejohn was forced out of business by artificially lowered wholesale prices supported by interstate derived funds, the Court of Appeals below permitted Shell, American and Sooner to thumb their noses at the Robinson-Patman Act.

Prohibition of the practice employed by Shell, American and Sooner was the purpose of the Robinson-Patman Act. As expressed by Congressman Patman, on the eve of enactment of the statute, in 80 *Congressional Record*, 8235 (May 28, 1936).

> One of the objects of the Bill is . . . to prevent the large corporate chains from selling below cost in certain localities, thus destroying the independent merchants, and making it up at other places where their competitors have already been destroyed.

In *Moore, supra,* this Court also made clear that the practice contrived by Shell, American and Sooner was not permissible.

Moore, supra, like *Littlejohn,* was a primary line case. In *Moore,* the plaintiff, like Littlejohn, was a competitor of the defendant. Moore was in the bakery business in Santa Rosa, New Mexico; like Littlejohn, none of his activities were of an interstate character. The respondent was in the bakery business in Clovis, New Mexico, and was one of several interstate corporations having interlocking ownership. The Mead Company had plants in Lubbock and Big Spring, Texas, and at Hobbs, Roswell and Clovis, New Mexico. All the bread involved was manufactured at the Clovis plant. The parties engaged in a price war in Santa Rosa which resulted in Moore being forced out of business. Mead financed the war with the proceeds of interstate sales.

The evidence also showed that Mead sold bread in Santa Rosa at a price lower than it sold bread in Farwell, Texas, a non-competing market; while that fact was mentioned in this Court's fact recitation, it was ignored in connection with the decision itself. Indeed, the Court disregarded the physical delivery of bread to Texas, for the above quoted language, 348 U.S. at 119, begins:

> We think that the practices in the present case are *also* included within the scope of the antitrust laws. [Emphasis added.]

By the use of the word "also" this Court made quite apparent that its decision rested on the "interstate underwriting" concept.

The panel decision below was applauded by several Law Reviews as restoring the Congressional purpose to Robinson-

Patman Act jurisdictional decisions.[4] In 41 *Cincinnati L. Rev.*, at 693 (1972), it was said:

> This part of the opinion [in *Moore*] has been treated as strong but "mere" dictum in light of the interstate sale in the case, but clearly it was not the interstate sale to Texas about which Douglas was concerned. That fact was given cursory treatment and little weight in the opinion. What is material in *Moore is* that interstate profits were used to destroy a local merchant. The facts relied upon by Douglas were the practices of using interstate profits to underwrite local price cutting. This is the anticompetitive practice that the Act was intended to remedy.

This Court has never permitted the form of a transaction to control, where the purpose and effect are illegal. The issue is squarely presented by this case. For the Court to decline review would mean that, by contriving an artificial delivery mechanism, Shell, American and Sooner are free to discriminate in price and eliminate competition, with impunity.

2. The Congressional purpose has been nullified by constrictive judicial interpretation which has made the statutory language "purchases in commerce" synonymous with "interstate delivery of the physical goods sold". Such interpretation has made the Robinson-Patman Act illusory, and has permitted Shell and American to use their financial power, derived from world marketing, to drive small, independent competitors out of business. This Court must redress the improper decisions of the

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[4] 41 *Cincinnati L. Rev.* 689 (1972), "Recent Cases"; 48 *Ind. L. J.* 293 (1973), "Jurisdictional Reach Under § 2(a) of the Robinson-Patman Act: Littlejohn Says Moore, Others Say Less"; 4 *St. Mary's L. J.* 204 (1972), "Trade Regulation"; 26 *Vand. L. Rev.* 146 (1973), "Antitrust". *Contra*, 86 *Harv. L. Rev.* 765 (1973), "Recent Cases".

lower Federal Courts so that the statutory language can be applied in the manner intended by the enacting Congress.

The word "purchases" connotes more than "physical delivery". It includes all the aspects of and relationships inherent in the consummation of a purchase and sale transaction. It includes negotiations between purchaser and seller; it includes contracts related to the sale between purchaser and seller; it includes financial arrangements between the purchaser and seller; it includes discounts, price supports and rebates paid or given to the purchaser by the seller in order to induce and make possible the sale at a particular price; and it includes physical delivery of the goods sold.

Littlejohn suggests that *all* the aspects of the consummated transaction are within the scope of the "purchases in commerce" language. Consequently, if any one or more of those aspects is "in commerce", the jurisdictional requirement is satisfied.

Had Congress intended to limit the reach of the statute to the sale of goods "physically delivered in interstate commerce", it would have said so. Congress did not so limit the Robinson-Patman Act, and the lower Federal Courts are not the agents of Congress empowered to rewrite the law.

As the enacting Congress had a right to expect, this Court must redress the improper decisions of the lower Federal Courts. This Court should construe "purchases in commerce" in the manner respectfully suggested by Littlejohn, since that is the manner intended by the enacting Congress. Those who purposely seek to eliminate their competitors should not be permitted to play word games with the statute and thereby immunize themselves from responsibility for their illegal actions.

3. The Supreme Court has denied *certiorari* in cases where

Moore, supra, and Section 2(a) have been constricted, e.g., *Belliston v. Texaco, Inc.*, 455 F.2d 175 (10 Cir. 1972), *cert. denied*, 408 U.S. 928 (1972); *Hiram Walker v. A & S Tropical, Inc.*, 407 F.2d 4 (5 Cir. 1969), *cert. denied*, 396 U.S. 901 (1969); *Willard Dairy Corp. v. National Dairy Prod. Corp.*, 309 F.2d 943 (6 Cir. 1962), *cert. denied*, 373 U.S. 934 (1963); also, the Court has denied *certiorari* where the full scope of *Moore, supra*, and Section 2(a) have been applied, e.g., *Rangen v. Sterling Nelson & Sons*, 351 F.2d 851 (9 Cir. 1965), *cert. denied*, 383 U.S. 936 (1966).

While none of those, and similar cases, were specifically predicated on *Moore, supra*, its application was important. For whatever reasons the cited cases (and others) were not reviewed, by its failure to review, this Court has contributed significantly to the creation of the anticompetitive practice demonstrated by Shell, American and Sooner.

It seems peculiar that the Courts of Appeals have been permitted to refuse to follow *Moore, supra*. It was said of the panel decision in *Littlejohn*:

> The instant decision is the first federal court of appeals case which has followed the Supreme Court's ruling in *Moore* that a complaint states a cause of action under section 2(a) when it alleges that profits earned through interstate activities have been used to underwrite the losses of local discriminatory price-cutting campaigns and, as such, the decision represents a significant departure from the decisions of other circuits, 26 *Vand. L. Rev.*, 146, 151 (1973), "Antitrust".

Acceptance of this Court's decisions by the Courts of Appeals ought to be the norm — not the exception.

The issues are so directly raised in the case at bar that this Court should clarify the law, in the interest of the proper administration of the judicial system, and its obligation to apply the statutes enacted by Congress in the manner intended by Congress.

CONCLUSION

Petitioner would respectfully suggest that this case is precisely what the Robinson-Patman Act is all about. It focuses sharply on the anticompetitive conduct that the Act was created to prevent. It raises squarely factual circumstances that permit this Court to reconfirm its unanimous opinion in *Moore, supra*, and to interpret the Robinson-Patman Act in the manner obviously intended by the enacting Congress.

Petitioner therefore prays that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

Original Signed By
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CERTIFICATE OF SERVICE

I, JAY M. VOGELSON, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Petition for Writ of Certiorari on counsel for Respondents, by depositing same in the United States mails, postage

prepaid, on October 23, 1973, addressed to William Simon, Esq., 1730 Pennsylvania Avenue, N.W., Washington, D.C. 20006 and D. L. Case, Esq., First National Bank Building, Dallas, Texas 75202, counsel for Shell; to Matthew J. Gallo, Esq., 910 South Michigan Avenue, Chicago, Illinois 60680 and Khent H. Rowton, Esq., 2001 Bryan Tower, Dallas, Texas 75201, counsel for American; and to Charles H. Gullett, Esq., Citizens National Bank Building, Dennison, Texas, counsel for Sooner.

Original Signed By
JAY M. VOGELSON

Jay M. Vogelson

APPENDIX "A"

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

CIVIL ACTION NO. 3-4195-D

RALPH H. LITTLEJOHN, JR.,
Plaintiff,

vs.

SHELL OIL COMPANY, AMERICAN OIL COMPANY AND SOONER OIL COMPANY,
Defendants.

MEMORANDUM OPINION AND ORDER

Came on for consideration the Motion for Summary Judgment filed herein by American Oil Company and adopted by Shell Oil Company and Sooner Oil Company, all of whom are defendants in the above case. These defendants have moved for summary judgment for lack of jurisdiction.

The plaintiff Littlejohn alleges he operated a gas station on Plano Road in the city of Garland, Dallas County, Texas. Two gas stations, one bearing the name Shell and the other the name American, were located approximately one-half block from Littlejohn's station. In June, 1970, the Shell and American stations began selling gasoline to the general public for 26.9¢ and 25.9¢ a gallon respectively, though gasoline was being sold at other stations bearing the names Shell and American for 28.9¢ a gallon in the same general area at the same time. Littlejohn alleges he was unable to meet these prices and was forced to close his station. He now brings suit under §2(a) of the Clayton Act. 15 U.S.C. §13(a), as amended by the Robinson-Patman Act, for damages.

Section 13(a) forbids "any person engaged in commerce, in the course of such commerce . . . to discriminate in price between different purchasers . . . where either or any of the purchases involved in such discrimination are in commerce . . ." The "in commerce" requirement of §13(a) has been interpreted by the Fifth Circuit to require alleged discriminatory sales to cross state lines. *Hiram Walker, Inc. and South Florida Liquor Distributors, Inc., v. A & S Tropical, Inc.*, 407 F.2d 4 (5th Cir. 1969); *Cliff Food Stores, Inc. v. Kroger, Inc. and Bi-Lo, Inc.*, 417 F.2d 203 (5th Cir. 1969).

There are three transactions involved in the sale of American's gas. According to affidavits of the secretary of American, the president of Sooner, and the operator of the American station, American sells gas to Sooner under a jobber sales contract. Sooner sells gas to the American station involved in this case, which is operated by Richard P. Muller. Muller sells to the public. There are two transactions involved in the sale of Shell's gas. Shell sells the gas to the Shell station, operated by Carl Raines, and Raines sells the gas to the general public.

There are thus two types of transactions upon which plaintiff could predicate alleged price discrimination: the wholesale transactions between the oil companies and the retail dealers, and the retail transactions between the dealers and the public. Plaintiff has failed to allege interstate discriminatory sales in either of these types of transactions.

A. The Wholesale Transactions

Plaintiff has failed to allege that any gasoline sold from American to Shell to the Plano Road dealers was transported in interstate commerce. The uncontradicted affidavit of the head of Shell's marketing distribution department states that the gas sold to Raines is refined in Houston, Texas, and that transportation of the gas to Raines is solely within the State of Texas. Thus jurisdiction may not be predicated upon wholesale transactions in this case.

B. The Retail Transactions

Plaintiff has failed to allege that any discriminatory sales from dealer stations to the public were in interstate commerce. In his petition plaintiff complains merely that Shell and Ameri-

can stations sold gas at different prices within an area of Dallas County. Plaintiff alleges that profits derived from interstate operations were used to finance the lower retail prices of the Shell and American stations on Plano Road. Language of this type is found in *Moore v. Mead's Fine Bread*, 348 U.S. 115 (1954), but it is significant to note that the defendant in *Moore* did make discriminatory interstate sales — from its New Mexico bakery to stores in Texas — upon which jurisdiction could be based. Jurisdiction may not be based on the retail sales in this case, for none of these sales crossed state lines.

In point is *Walker Oil Co., Inc. and Big S Oil Co. v. Hudson Oil Co. of Missouri, Inc.*, 414 F.2d 588 (5th Cir. 1969). In that case Murphy Oil Company operated a terminal facility in Mobile, Alabama. The gas in the terminal facility came from outside Alabama. Murphy sold the gas to Hudson Oil Company, and Hudson sold the gas to its retailers at wholesale prices. Part of the gas in this case was transported by Hudson to a Mobile, Alabama, retail station, and part of the gas was transported to a Pensacola, Florida, retail station. The retail dealers in Mobile and Pensacola sold to the public for different prices.

Walker and Big S sued Hudson for price discrimination in the retail sales. The Fifth Circuit granted summary judgment for lack of jurisdiction, holding that the sales from the retailers to the public were purely intrastate and did not satisfy the "in commerce" requirement of the Robinson-Patman Act. Similar holdings are found in *Cliff Food Stores, Inc. v. Kroger, Inc. and Bi-Lo, Inc.*, 417 F.2d 203 (5th Cir. 1969), and *Food Basket, Inc. v. Albertson's, Inc.*, 383 F. 2d 785 (10th Cir. 1967). In these cases interstate supermarket chains sold at

lower prices in some stores than in others. Jurisdiction did not lie because the sales in question were local retail sales and requisite sales across state lines were not present.

C. The "Control" Issue

A defendant may not be considered a seller for purposes of the Robinson-Patman Act without a showing that the defendant "controlled" the discriminatory sale. *Hiram Walker Inc. and South Florida Liquor Distributors, Inc. v A. & S. Tropical, Inc.*, 407 F.2d 4 (5th Cir. 1969). American's affidavits establish that American does not control the price of gas resold by Sooner to Muller, the American station operator, and Sooner does not control the price of gas resold by Muller to the public. The affidavit of Carl Raines, Shell's retailer, states that Shell does not have the right to control his business. These affidavits are not contradicted. Plaintiff has failed to show that defendants controlled the local retail prices of these two stations and he may not seek relief under the Robinson-Patman Act.

D. Littlejohn's Standing to Sue

It is questionable that Littlejohn has standing to sue defendants Shell and American in this case. The main purpose of §2(a) of the Robinson-Patman Act is to insure that purchasers of a single seller will not be injured by a seller's discriminatory pricing policies. *FTC v. Sun Oil Co.*, 371 U.S. 505 (1963); *Walker Oil Co. and Big S Oil Co. v. Hudson Oil Co. of Missouri, Inc.*, 414 F.2d 588, 590. The natural plaintiffs in this case are automobile drivers who are forced to pay higher prices for gas at some stations than at others. Littlejohn, the complainant, is a competitor of, not a purchaser from, the defendants. Further,

assuming Littlejohn may properly bring suit, he has failed to show any damages resulting from the discriminatory pricing of Shell and American.

Plaintiff has failed to allege that any discriminatory sale has crossed state lines or show that defendants controlled any discriminatory sales. It is the opinion of the Court that the "in commerce" requirement of the Robinson-Patman Act has not been met and that jurisdiction under 15 U.S.C. §13(a) does not lie in this case.

It is therefore ORDERED that the Motions for Summary Judgment urged by defendants are sustained and the case is dismissed.

Dated April 28, 1971.

/s/ Robert M. Hill

United States District Judge

APPENDIX "B"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2090

RALPH H. LITTLEJOHN, JR.,
Plaintiff-Appellant,

versus

SHELL OIL COMPANY, AMERICAN OIL COMPANY and SOONER OIL COMPANY,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

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(March 22, 1972)

Before WISDOM, COLEMAN and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge: In this suit for damages under Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, Title 15, U.S.C., Section 13(a), the district court concluded that it was without subject-matter jurisdiction and granted summary judgment for the defendants. We hold that a complaint under the Robinson-Patman Act need not allege that one of the sales involved was interstate in character as long as it charges that interstate sales were used to underwrite allegedly discriminatory intrastate price-cutting tactics. Accordingly, we reverse the judgment of the court below and remand for further proceedings.

The plaintiff, Ralph H. Littlejohn, in his original and amended complaints, alleged that he operated an independent gas station under the trade name of Lynmar Oil Company in Garland, Texas, which is located in the north portion of Dallas County. Within half a mile were two other stations, one bearing the name of Shell Oil Company (Shell) and the other bearing the name of American Oil Company (American). Sooner Oil Company (Sooner) was joined as American's local wholesale dealer. In June, 1970, these stations began selling gasoline to the general public at reduced prices, one of them at 25.9¢ and the other at 26.9¢ per gallon. At the same time gasoline was being sold by other stations in the Dallas, Texas, area bearing the names Shell and American for 28.9¢ per gallon. Littlejohn says that he could not meet this kind of competition and that he was forced to close his station. The amended complaint also alleged:

> "The profits of Defendants Shell Oil Company, American Oil Company and Sooner Oil Company derived from their interstate operations were wrong-

> fully used by each of them to sell gasoline at the American Oil Company service station at Forest Lane and Plano Road and at the Shell Oil Company service station at Forest Lane and Plano Road at a lower price than each was selling gasoline to any other American Oil Company or Shell Oil Company service station in the Northeast Dallas area. In particular, Defendants American Oil Company and Shell Oil Company used profits which each of them derives from the overall large interstate producing and marketing business of each of them." (Paragraph IV.D, First Amended Complaint)

The original complaint was filed September 29, 1970. It alleged that Shell and American did business in interstate commerce but did not allege that the gasoline delivered to the Shell and American stations in Dallas County, Texas, had moved in interstate commerce or had involved as much as one sale in interstate commerce. On January 20, 1971, the district judge held a pretrial conference at which time he indicated his doubts about subject-matter jurisdiction. The result was that he gave Littlejohn until February 1, 1971, to file an amended complaint, briefs on subject-matter jurisdiction to be filed by February 22, 1971, and it was indicated that the court would try to rule on the issue by March 1, 1971. It was further directed that American, Sooner, and Shell should complete their discovery during March and April, 1971, while Littlejohn was to propound written interrogatories during March and April, and should take oral depositions in May and June, 1971.

The amended complaint, which included the above-quoted allegation concerning the defendants' interstate operations, was filed on February 1, 1971. Again, no sale made across state lines was alleged. On February 12, 1971, the defendants began to file motions for summary judgment on the ground that the allegedly discriminatory sales were not made in interstate commerce and thus, as a matter of law, were not covered by the Robinson-Patman Act.[1] The motions were supported by affidavits which asserted that none of the gasoline involved had moved in interstate commerce, having been produced at refineries in Texas, and that there had been no sale across state lines.

On March 1, 1971, the plaintiff filed an unsworn response to the motions for summary judgment in which he urged that the motions of the defendants were premature, that the facts were not before the court in complete fashion, that the plaintiff had just recently initiated discovery with reference to jurisdictional facts by requesting the defendants to produce documents, and that the defendants had no right to keep their records,

[1]Title 15, U.S.C., § 13(a) in pertinent part provides:

> "It shall be unlawful for any person, engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them. . . ."

personnel and sources of information from the plaintiff when sought through reasonable discovery. The summary judgment motions were argued March 19, 1971. Thirteen days after argument was had, the parties submitted an agreement to the court below to the effect that the defendants would be relieved of the obligation to comply with the plaintiff's request for production of documents in the event the district judge granted the defendants' motions for summary judgment. The district court, pointing to the amended complaint's failure to allege an interstate sale of a discriminatory nature, on April 28, 1971, granted the defendants' summary judgment motions. It is from the grant of these motions that the plaintiff below entered this appeal.

We are called upon to resolve two points of law on this appeal: (1) does the United States Supreme Court's decision in *Moore v. Mead's Fine Bread Company*, 1954, 348 U.S. 115, 75 S.Ct. 148, 99 L.Ed. 145, relieve the plaintiff of the burden of alleging and proving at least one discriminatory interstate sale? and (2) should the plaintiff be penalized (by affirmance of the lower court's judgment) because he did not respond to the defendants' motions for summary judgment by means of an affidavit (as required by Rule 56(f), Federal Rules of Civil Procedure)?

Moore, supra, was an action for treble damages for violations of the Clayton and Robinson-Patman Acts relating to price discrimination. Both parties were engaged in the bakery business in New Mexico, petitioner-plaintiff at Santa Rosa and respondent-defendant at Clovis. The Mead family interests controlled bakeries at several locations in New Mexico and Texas

and employed integrated purchasing and marketing techniques. The respondent-defendant sold bread in Farwell, Texas, by means of truck deliveries from its Clovis, New Mexico, plant. From September, 1948, to April, 1949, respondent-defendant cut its prices in Santa Rosa, New Mexico, without cutting its prices anywhere else. As a result, petitioner-plaintiff was forced out of business. The district court entered judgment for the plaintiff and the Court of Appeals reversed. The Supreme Court, speaking through Mr. Justice Douglas, reinstated the district court's judgment. The following language from the Supreme Court's opinion in *Moore* is crucial to the disposition of this appeal:

> "We think that the practices in the present case are also included within the scope of the anti-trust laws. We have here an interstate industry increasing its domain through outlawed competitive practices. The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him. But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources which include not only respondent but also a group of interlocked companies engaged in the same line of business; and the prices on the interstate sales, both by respondent and by the other Mead companies, are kept high while the local prices are lowered. If this method of competition were approved, the pattern for growth of monopoly would be simple. As long as the price warfare was strictly intrastate, interstate business could grow and

> expand with impunity at the expense of local merchants. The competitive advantage would then be with the interstate combines, not by reason of their skills or efficiency but because of their strength and ability to wage price wars. The profits made in interstate activities would underwrite the losses of local price-cutting campaigns. No instrumentality of interstate commerce would be used to destroy the local merchant and expand the domain of the combine. But the opportunities afforded by interstate commerce would be employed to injure local trade. Congress, as guardian of the Commerce Clause, certainly has power to say that those advantages shall not attach to the privilege of doing an interstate business." 348 U.S. at 119-120, 75 S.Ct. at 150, 99 L.Ed. at 149-150.

Following the *Moore* decision, several Courts of Appeals have taken the position that the language quoted above is merely dicta and that the plaintiff is still required to allege and prove an interstate discriminatory sale in order to state a claim under the price discrimination provisions of the Robinson-Patman Act. Frequently, this limited application of the *Moore* ruling has been buttressed by reference to the existence of interstate bread sales in that very case. See *Food Basket, Inc. v. Albertson's Inc.*, 10 Cir. 1967, 383 F.2d 785; *Willard Dairy Corp. v. National Dairy Products Corp.*, 6 Cir. 1962, 309 F.2d 943, cert. denied 1963, 373 U.S. 934, 83 S.Ct. 1534, 10 L.Ed.2d 691; *Central Ice Cream Co. v. Golden Rod Ice Cream Co.*, 7 Cir. 1961, 287 F.2d 265. This Court has never determined whether the Robinson-Patman Act re-

quires the plaintiff to allege and prove an interstate sale of a discriminatory nature where interstate "underwriting" is charged.[2]

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[2]This Court's decision in *Cliff Food Stores, Inc. v. Kroger, Inc.*, 5 Cir. 1969, 417 F.2d 203, cited by the court below, can be interpreted to have held, at least by dictum, that in order for jurisdiction to exist under the Robinson-Patman Act one of the challenged discriminatory sales transactions must have occurred in interstate commerce. *Cliff Food Stores*, however, is distinguishable from the matter now before us because in that case the plaintiff's attack was directed at allegedly unlawful price-cutting tactics in the sales of groceries to the general public. We determined that such sales were not "in commerce" for purposes of the Act, because the sales involved were of commodities which had "come to rest", and had lost their interstate character. In this case plaintiff Littlejohn specifically alleged:

> "Defendants American Oil Company and Sooner Oil Company sold regular gasoline to the American Oil Company service station at Forest Lane and Plano Road at a price lower than which each of them charged for regular gasoline at all other American Oil Company service stations in the Northeast Dallas area during the period of which Plaintiff complains.
>
> "Defendant Shell Oil Company sold regular gasoline to the Shell Oil Company service station at Forest Lane and Plano Road at a price lower than which each of them (sic) sharged for regular gasoline at all other Shell Oil Company service stations in the Northeast Dallas area during the period of which Plaintiff complains." (Paragraph IV.C, First Amended Complaint)

Because this case involves a challenge to the *wholesale* pricing policies of the defendants (as well as to the retail pricing policies), we believe that our *Cliff Food Stores* decision does not control subject-matter jurisdiction where, as here, "interstate underwriting" is alleged.

Brief consideration should be given to two other decisions cited by the district court. Our decision in *Walker Oil Company, Inc. v. Hudson Oil Company of Missouri, Inc.* 5 Cir. 1969, 414 F.2d 588, is distinguishable on the same basis as *Cliff Food Stores*. In *Hiram Walker, Inc. v. A & S Tropical, Inc.*, 5 Cir. 1969, 407 F.2d 4, cert. denied 1969, 396 U.S. 901, 90 S.Ct. 212. ____ L.Ed.2d ____, we held that a manufacturer of alcoholic beverages, who sold beverages in interstate commerce to wholesale distributors throughout the United States, who did not sell directly to retail stores, who did not fix prices or establish terms or conditions of resale, and whose activities were limited to promotional work by "missionary"

Until the Supreme Court explicitly repudiates the above-quoted language from Mr. Justice Douglas' opinion in *Moore*, we believe that a Robinson-Patman Act plaintiff should be entitled to proceed upon a theory that the interstate operations of the defendant or defendants were used to "underwrite" local discriminatory pricing practices. Consequently, we hold that the district court erred in granting the defendants' motions for summary judgment before the plaintiff had been afforded the opportunity to utilize discovery to develop basic jurisdictional facts from data solely within the defendants' possession. The district court's judgment must be reversed, in our opinion, even though the plaintiff did not oppose the summary judgment motions by means of an affidavit.

Rule 56(f), Federal Rules of Civil Procedure, provides:

> "Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the Court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

Professor Moore, in his treatise on federal practice, asserts:

> "Even where a proper showing has not been made under Rule 56(f), the court may order a continuance or make such other order as is just, where the oppos-

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men who provided retailers with advertising materials and generally acted to supplement a national advertising effort designed to promote the manufacturer's products, could not be held liable as a "seller" within the meaning of the Robinson-Patman Act. *Hiram Walker*, therefore, does not control the present case.

> ing party has proceeded under some error of fact or law or for some other reason it would be unjust, under the circumstances of the case, to grant a summary judgment without allowing the opposing party an opportunity to present his opposing evidence." Moore's Federal Practice, Paragraph 56.24, page 2880.

As noted earlier in this opinion, the plaintiff filed a timely response to the defendants' motions for summary judgment. Although that response was not presented in the form of a sworn affidavit, it did adequately advise the court below of the plaintiff's reasons for opposing the grant of the motions. Under these circumstances, we deem it inappropriate to affirm the grant of summary judgment in favor of the defendants because of the plaintiff's failure to comply with the technical requirements of Rule 56(f). Court and opposing counsel were as fully apprised of the request for discovery and its purpose as if the response had been filed in affidavit form. Appending a *jurat* to the response would have contributed nothing to its substance.

In reversing the judgment of the district court, we express or imply no opinion whatsoever with respect to the merits of the case. We simply hold that the district court acted prematurely in foreclosing the plaintiff from further discovery regarding the interstate aspects of the defendants' operations, from the only meaningful source of such discovery, the defendants' records.

REVERSED and REMANDED FOR FURTHER PROCEEDINGS.

COLEMAN, Circuit Judge, dissenting.

With deference, the opinion of the majority is not only in conflict with the cited decisions from other Circuits but is, in my opinion, in conflict with prior decisions of this Circuit which have not been overruled en banc and hence are controlling.

Moore v. Mead's Fine Bread Company, discussed in the majority opinion, was decided by the Supreme Court in 1954. It is true that Mr. Justice Douglas, writing for the Court, did elaborate upon the use of interstate earnings, but Mead's had sold part of its bread in interstate commerce.

In 1969 we decided *Hiram Walker, Incorporated v. A & S Tropical*, 407 F.2d 4, cert. denied 396 U.S. 901. We there said, 407 F.2d 8, that the "Robinson-Patman Act is applicable only where the allegedly discriminatory transactions took place in interstate commerce [footnote omitted]." That is "* * * at least one of the two transactions which, when compared, generate a discrimination must cross a state line".

This holding was reaffirmed in *A & M Stores, Inc. v. Hiram Walker, Inc.*, 5 Cir., 1970, 427 F.2d 167.

In *Walker Oil Co. v. Hudson Oil Co. of Missouri*, 5 Cir., 1969, 414 F.2d 588, 589, we again held that "under §2(a) [of the Robinson-Patman Act] at least one or both of the sales alleged to be discriminatory 'must be in commerce'," citing *Hiram Walker, Inc. v. A & S Tropical*, supra.

In *Cliff Food Stores, Inc. v. Kroger, Inc.*, 5 Cir., 1969, 417 F.2d 203, we reiterated that "at least one sale rule" and

specifically *rejected* the argument that *Mead's Fine Bread* supports jurisdiction if the price cutting is financed by profits from multi-state operations.

Thus, I am at a loss to understand how my Brethren of the majority may overrule a prior decision of this Court, three years old, without *en banc* action.

I do not understand that newly retained counsel for Mr. Littlejohn really contends otherwise.

What he does say in his brief is:

> "Littlejohn seeks by this appeal only the opportunity to conduct limited discovery in order to show that the discriminatory sales 'were in commerce'."

The background for this contention (reiterating some of the language in the majority opinion) may be stated as follows:

The original complaint was filed September 29, 1970. It alleged that Shell and American did business in interstate commerce but did not allege that the gasoline delivered to the Shell and American stations in Dallas County, Texas, (which includes Garland) had moved in interstate commerce or had involved as much as one sale in interstate commerce.

On January 20, 1971, the District Judge held a pretrial conference. He indicated his doubts about subject matter jurisdiction. The result was that he gave Littlejohn until February 1 to file an amended complaint, briefs on subject matter jurisdiction to be filed by February 22, and it was indicated that the Court would try to rule on the issue by March 1.

It was further directed that American, Sooner, and Shell should complete their discovery during March and April, 1971, while Littlejohn was to propound written interrogatories during March and April, and should take oral depositions in May and June.

Obviously, if the complaints came to dismissal for lack of subject matter jurisdiction (upon which a ruling was anticipated by March 1) that would end the case. Further discovery would be useless. The only reasonable interpretation to be put on the discovery portions of the Judge's order is that he was outlining the steps to be taken if the plaintiff's amended complaint should withstand dismissal.

The amended complaint was filed February 1, 1971. It failed to charge a sale made across a state line. It asserted that the defendant operated in interstate commerce but not that the gasoline in question had moved interstate.

On February 12, the defendants began filing motions for summary judgment on the ground that the allegedly discriminatory sales were not made in interstate commerce and thus, as a matter of law, were not covered by the Robinson-Patman Act. The motions were supported by affidavits. The plaintiff filed no counter-affidavit of any kind.

On March 1, plaintiff filed an unsworn "Response" to the motions for summary judgment. This response contended that summary disposition of anti-trust cases is not looked upon with favor, citing *Cliff Food Stores v. Kroger, Inc.*, 5 Cir., 1969, 417 F.2d 203 at 205, that the motions for summary

judgment were "premature", that the facts were not before the Court in complete fashion, that plaintiff had just recently initiated discovery with reference to jurisdictional facts by requesting the defendants to produce documents, and that the defendants had no right to keep their records, personnel, and sources of information from the plaintiff when sought through reasonable discovery.

The motions for summary judgment were argued March 10, 1971.

On March 23, 1971, by copy of a letter the parties notified the Judge of their agreement that objections to production of documents would not be presented until such time as the motions for summary judgment had been decided. Paragraph 2 of this letter memorandum of agreement contained the following language:

> "If the Court sustains any of the Defendants' motions, thus dismissing Plaintiff's claims against the same so that such Defendant is no longer before the Court after such ruling, then the Defendant or Defendants so situated shall be under no obligation or duty to comply with Plaintiff's Requests for Production of Documents in any manner."

On April 28, 1971, the District Court granted summary judgment, citing *Walker Oil Company, Inc. v. Hudson Oil Company of Missouri, Inc.*, 5 Cir., 1969, 414 F.2d 588; *Cliff Food Stores, Inc. v. Kroger, Inc.*, 5 Cir., 1969, 417 F.2d 203; *Food Basket, Inc. v. Albertson's, Inc.*, 10 Cir., 1967, 383 F.2d

785; and *Hiram Walker, Inc. and South Florida Liquor Distributor, Inc. v. A & S Tropical, Inc.*, 5 Cir., 1969, 407 F.2d 4.

In *Cliff Foods, supra*, this Court held that to maintain an action under §2(a), the plaintiff must do three things:

1. Allege and prove that the defendant is engaged in interstate commerce;
2. Allege and prove that the challenged discrimination was committed in the course of the defendant's interstate commerce; and
3. Allege and prove that at least one of the challenged discriminatory sales transactions occurred in interstate commerce.

The issue for decision, then, is whether the District Court erred in granting summary judgment before Littlejohn could complete the discovery procedures he now contends that he should have been permitted to complete.

In his reply brief, Littlejohn says that the agreement for the extension of time for the filing of objections to request for documents was a courtesy to an opposing attorney, who was ill. We observe, however, that such a courtesy would not have suggested a proviso that nothing would have to be produced at any time if summary judgments were granted for the defendants.

Littlejohn says that his pretrial deposition revealed that the required evidence as to the interstate character of the sales was solely within the private knowledge of the defendants and

that he should have been allowed to complete discovery but concedes in his brief, "Littlejohn cannot, of course, advise the Court what evidence will be adduced".

I think that if appellant really desired to insist on further discovery before action on the motions for summary judgment he should have looked to §56(e) and §56(f) of the Federal Rules of Civil Procedure:

> "Section 56(e):
>
> "When a motion for summary judgment is made and supported as provided is this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, *must set forth specific facts showing that there is a genuine issue for trial.* If he does not so respond, summary judgment, if appropriate shall be entered against him." [Emphasis added].
>
> "Section 56(f):
>
> "Should it appear *from the affidavits of a party opposing the motion* that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." [Emphasis added].

Littlejohn did not take refuge in these rules. He did nothing

but resist the motion for summary judgment in general terms. He filed no counter-affidavits. He thus failed to comply with Rule 56(e) as to any genuine issue of fact. He now tells this Court that he does not know what evidence might be produced if the summary judgments were to be vacated and remanded for discovery procedures. The complaint failed to allege an indispensable jurisdictional prerequisite, that is, at least one sale in interstate commerce. May a litigant file a complaint which on its face is insufficient for subject matter jurisdiction and, despite uncontroverted affidavits showing lack of jurisdiction, stall off summary judgment so as to pursue discovery which may or may not turn up jurisdictional facts, and that without following the procedure prescribed by Rule 56(e) and Rule 56(f)?

Even in a Robinson-Patman suit I do not think he can, see *White Motor Company v. United States*, 372 U.S. 263 (1963); *Lundeen v. Cordiner*, 8 Cir., 1966, 356 F.2d 169; *Robin Construction Company v. United States*, 3 Cir., 1965, 345 F.2d 610; and *Liberty Leasing Company v. Hillsum Sales Corp.*, 5 Cir., 1967, 380 F.2d 1013.

In *Robin* it was said:

> "It is true that Rule 56(f) also authorizes the Court in appropriate cases to refuse to enter summary judgment where the party opposing the motion shows a legitimate basis for his inability to present by affidavit the facts essential to justify his opposition; but to take advantage of this provision he must state by affidavit the reasons for his inability to do so and these reasons

> must be genuine and convincing to the court rather than merely colorable. It is not enough to rest upon the uncertainty which broods over all human affairs or to pose philosophic doubts regarding the conclusiveness of evidentiary facts." 345 F.2d at p. 614.

In our case of *Liberty Leasing Company v. Hillsum Sales, supra,* we said that the least a party opposing a motion for summary judgment should do is to file an affidavit pursuant to Rule 56(f).

Under all the considerations herein recited I cannot agree that the District Court fell into error in granting summary judgment for the defendants.

I respectfully dissent.

APPENDIX "C"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2090

RALPH H. LITTLEJOHN, JR.,
Plaintiff-Appellant,

versus

SHELL OIL COMPANY, AMERICAN OIL COMPANY and SOONER OIL COMPANY,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion March 22, 1972, 5 Cir., 1972, ____ F.2d ____).

(January 2, 1973)

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY, Circuit Judges.

BY THE COURT: A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc.

IT IS ORDERED that the cause shall be reheard by the Court en banc on briefs without oral argument. The Clerk shall set a briefing schedule for the filing of supplemental briefs.

APPENDIX "D"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2090

RALPH H. LITTLEJOHN, JR.,
Plaintiff-Appellant,

versus

SHELL OIL COMPANY, AMERICAN OIL COMPANY and SOONER OIL COMPANY,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

(August 10, 1973)

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GODBOLD, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY, Circuit Judges.*

*Judges Goldberg, Ainsworth, and Dyer did not participate in the consideration of this case.

BELL, Circuit Judge: The judgment of the district court dismissing the claim asserted by plaintiff Littlejohn under §2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 USCA, §13(a), was reversed by a panel decision of this court. *Littlejohn v. Shell Oil Company*, 5 Cir., 1972, 456 F.2d 225. Upon consideration of the cause en banc, we vacate the panel decision for reasons to be hereinafter stated.

In sum, we affirm the ruling of the district court that it was without subject matter jurisdiction under the Act absent proof that at least one of each of defendants challenged sales transactions occurred in commerce.[1] We disagree with the panel majority that the interstate sale requirement of the Act may be satisfied by showing the use of profits derived from interstate commerce to underwrite the local price cutting activity. To this extent, we are in agreement with the views of the dissenting member of the panel. We do agree, however, with the majority of the panel that the discovery proceedings were truncated, albeit inadvertently. We thus vacate the judgments

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[1]Title 15, U.S.C. § 13(a) in pertinent part provides:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, *where either or any of the purchases involved in such discrimination are in commerce*, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ." (Emphasis added)

of dismissal and remand with direction that plaintiff be allowed a reasonable period of time within which to complete his discovery but on conditions to be stated in Part III, infra.

Plaintiff alleged that he operated an independent gas station in Garland, Texas which is in the northern portion of Dallas County. He also alleged that defendants, through two other stations within one half mile of his station, one selling the products of Shell Oil Company and the other selling the products of American Oil Company, began to sell gasoline to the general public in June 1970 at prices reduced below his selling price although defendants were selling, respectively, Shell and American gasoline, to other dealers in the general Dallas area at normal prices. He alleged that the purpose of defendants in so doing was to drive him out of business and that he was, in fact, forced to close his station because he could not meet the competition engendered by the low prices being charged at the two stations.[2]

The original complaint alleged that Shell and American were marketing gasoline in interstate commerce. There was no allegation, however, that the gasoline delivered to the Shell and American stations in the Dallas area had moved in interstate commerce, or that, with respect to each defendant, at least one sale in interstate commerce was involved. Some months later plaintiff amended his complaint to amplify on his original allegation that profits of defendants Shell and American, de-

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[2]Sooner Oil Company was joined as American's jobber in the Dallas area.

rived from their interstate operations, were used by each of them to support their acts of selling gasoline to plaintiff's competitors at the two stations in question at lower prices than were being charged by them to other Shell and American stations in the Dallas area. The amended complaint alleged that Sooner, a Texas corporation with its principal place of business in Oklahoma, was engaged in interstate commerce and was also using its interstate profits to support the price cutting in question.

As distilled, we conclude that, at this point, plaintiff had alleged a classic case of violation of § 2(a) by discrimination in sales at wholesale by sellers to their purchasers who competed with plaintiff, and with resulting injury to his business within the contemplation of § 4 of the Clayton Act. 15 USCA, § 15. See Fn. 3, infra.

Defendants duly answered. Meanwhile the district court conducted a pre-trial conference and became aware of the possible lack of subject matter jurisdiction in view of the absence of an allegation that, as to each defendant, at least one of the contended discriminatory sales was in interstate commerce. All parties filed briefs on the question. Plaintiff did not allege such interstate sales but relied instead, in the main, on "the use of interstate profits to underwrite" theory expressed in *Moore v. Mead's Fine Bread*, 1954, 348 U.S. 115, 75 S.Ct. 148, 99 L.Ed. 145. Each defendant filed an affirmative defense on the ground that none of the sales were in interstate commerce and thus the issue was clearly drawn. The district court then granted summary judgment for each of the

defendants on the basis of the absence of subject matter jurisdiction.[3]

I.

In reaching decision on the Robinson-Patman Act coverage question which is presented, we must have in mind the difference between the reach of the Sherman Act, 15 USCA, §§ 1-4, and the reach of § 2(a) of the Robinson-Patman Act, 15 USCA, § 13 (a). We pointed out the difference in *Lehrman v. Gulf Oil Company*, 5 Cir., 1972, 464 F.2d 26, 36-37, as modified on rehearing. There we quoted from *Cliff Food Stores, Inc. v Kroger, Inc.*, 5 Cir., 1969, 412 F.2d 203, 208-209, in saying:

> "To maintain an action under Section 13(a) the plaintiff must allege and prove, inter alia: (1) that the defendant is engaged in commerce; (2) that, in the course of such commerce, the defendant has discriminated in price between different purchasers of commodities of like grade and quality; (3) that '*either or any of the purchases involved in such discrimination are in commerce*'; and (4) that there is likely to be a severe, adverse effect on competition. (Emphasis added.) 15 U.S.C. §13(a). The language of the Act—

[3]We put aside the alternative theory of the district court that the plaintiff was not possessed of standing under § 2(a) to sue. The reasoning was that the purpose of § 2(a) was to prevent injury to purchasers from the discriminatory pricing policies of the same seller. This is only one purpose of the Act. It is settled that the Act also grants protection to a competitor whose business is injured by the discriminatory pricing policies. *Utah Pie Company v. Continental Baking Company et al.*, 1967, 386 U.S. 685, 87 S.Ct. 1326, 18 L.Ed.2d 406; *Moore v. Mead's Fine Bread*, supra. See history of Act in *Federal Trade Commission v. Anheuser-Busch, Inc.*, 1960, 363 U.S. 536, 80 S.Ct. 1267, 4 L.Ed.2d 1385.

requiring discriminatory sales to be 'in commerce' — is far narrower in scope than the 'effect on commerce' test applicable under the Sherman Antitrust Act. *See, e.g., Foremost Dairies, Inc. v. FTC*, 5th Cir. 1965, 348 F.2d 674; *Jones v. Metzger Dairies, Inc.*, 5th Cir. 1964, 334 F.2d 919. In appropriate cases, the Sherman Act may be applied to intra-state activities, including retail sales, if they *affect* interstate commerce. *See, e.g., United States v. Greater Kansas City Retail Coal Merchants' Ass'n.* W.D. Mo.1949, 85 F.Supp. 503. Under the terms of section 13(a), however, at least one of the sales alleged to be discriminatory must actually be *in* interstate commerce. *Walker Oil Co. v. Hudson Oil Co.*, 5th Cir. 1969, 414 F.2d 588 [Dated July 8, 1969]. In *Hiram Walker, Inc. v. A & S Tropical, Inc.*, 5th Cir. 1969, 407 F.2d 4 [Dated January 31, 1969], this Court stated:

> "[I]n order to come within the provisions of the Robinson-Patman Act, the [plaintiff] must demonstrate that the discriminatory sales were 'in commerce.' *** Thus, the Robinson-Patman Act, is applicable only where the allegedly discriminatory transactions took place in interstate commerce. That is, '* * * at least one of the two transactions which, when compared, generate a discrimination must cross a state line.'

See also Borden Company v. FTC, 7th Cir. 1964, 339 F.2d 953; *Willard Dairy Corp. v. National Dairy Products Corp.*, 6th Cir. 1962, 309 F.2d 943."

Taking the *Lehrman* opinion and the *Cliff Food Stores* language as a text, it is plain that plaintiff failed to allege the sine qua non of subject matter jurisdiction, that at least one of the sales involved in the alleged discrimination by the defendants, i.e., between the defendants and their respective Dallas gasoline dealers, was in interstate commerce. This much is conceded by plaintiff.[4]

II.

The question remains whether the holding of the Supreme Court in *Moore v. Mead's Fine Bread Company*, supra, creates an exception to the statutory requirement that there be at least one discriminatory interstate sale.

It is here that we disagree with plaintiff and with the panel decision. The exception would purportedly rest on the theory of the discriminator using profits from interstate activities to underwrite the losses sustained in driving a competitor out of business through local price-cutting. There is a statement to this effect in *Moore v. Mead's Fine Bread*, 348 U.S. at 119-120. The statement has, however, generally been treated as dictum. See e.g., *Cliff Food Stores, Inc. v. Kroger, Inc.*, supra, 417 F.2d at 209; *Willard Dairy Corp. v. National Dairy Products Corp.*, 6 Cir., 1962, 309 F.2d 943; *Central Ice Cream Co. v. Golden Rod Ice Cream Co.*, 7 Cir., 1961, 287 F.2d 265; *Food Basket, Inc. v. Albertson's Inc.*, 10 Cir., 1967, 383 F.2d 785; *Belliston v. Texaco, Inc.*, 10 Cir., 1972, 455 F.2d 175.

[4] It is not conceded that facts which might be discovered would not be sufficient to prove one or more interstate sales and thus support an amendment to the pleadings, or that it was necessary, under notice pleading concepts to allege more than jurisdiction generally under § 2(a) as was done.

This view of the *Moore v. Mead's Fine Bread* case follows from the facts of that case which demonstrate that the commerce requirements necessary to establish § 2(a) jurisdiction were satisfied, i.e., (1) the defendant was engaged in commerce; (2) the defendant had discriminated in price between different purchasers of commodities of like grade and quantity; and (3), that one of the purchases involved in such discrimination was in commerce. It is to be noted that proposition numbered (3) was not lacking. This much appears from a statement in the opinion. The price cutting against the competitor was in New Mexico but the discriminator was selling at a higher price in Texas out of its same New Mexico bakery. *Moore v. Mead's Fine Bread* is a landmark case in that it explicated the coverage of § 2(a) to protect the competitor of a purchaser who purchased from one seeking to destroy the competitor by price cutting. The case did not, however, alter or extend the specific jurisidictional requirements of § 2(a).[5]

III.

Lastly, we come to the question whether plaintiff is precluded from further opportunity to allege and prove that at least one of the sales to be compared to show discrimination by one or more of the defendants was in interstate commerce. Ordinarily, summary disposition of antitrust cases is fraught with danger. *Cliff Food Stores, Inc.*, supra, 417 F.2d at 105. But, as there, summary judgment may be appropriate where the

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[5]The panel opinion in *Littlejohn* has attracted the attention of the case note writers. See in support of the panel opinion, 41 Cincinnati L. Rev. 689. Contra, 86 Harv. L. Rev. 765. Dubitante, 26 Vand. L. Rev. 146, 4 St. Mary's L. J. 204.

facts involved in a determinative issue of law are clear, undisputed or unrefuted.

As was pointed out in the panel opinion, majority and dissenting opinions, 456 F.2d at 299, 231-232, plaintiff failed to counter the affidavits of defendants filed in support of their motions so as to make out a fact issue on the interstate sales question. See Rule 56(e), F.R. Civ.P., on the requirement to make a counter showing.

The problem is procedural. This case was handled procedurally in the latter-day trial concept of notice pleading, discovery, pre-trial conference or conferences, and motions, with a trial to follow only if all else fails. The fatality rate in summarily disposing of litigation in this manner is high indeed, and largely the result of prematurity through inordinate attention to theories of law at a time when the facts have not been fully developed.

Here the legal theories going to jurisdiction were clear. The problem, known to all once issue was joined, was whether there had been interstate sales. The defendants were insistent that there had not been. Somehow, in addition to the usual prolix non-trial proceedings, here the case was bifurcated or at least disjointed to the extent that the court intended throughout to pass on the motions for summary judgment without regard to the ongoing discovery proceedings. Plaintiff's position was that he could not show interstate sales without discovering the facts from defendants to show such sales. He filed requests for documents to this end. He requested that the court forego ruling on the

motions pending the completion of discovery. The court did not rule on the request but granted the motions.

The matter is clouded by an out of court agreement recorded in a letter from counsel for American to the other counsel in the case. Under the agreement, discovery was to be postponed pending the ruling on the motions for summary judgment.

There had been a previous letter agreement between the parties as to the order of discovery and this agreement was the result of a pre-trial conference in January. Defendants were to complete their discovery during March and April. Plaintiff was not to commence his discovery until March 1 and his request for documents was filed on March 1. On March 19 counsel for Sooner asked for a thirty day extension within which to comply with the request for production of documents on the ground that he was in the hospital. On March 23, counsel for American wrote the joint letter in question to plaintiff's counsel, counsel for Shell, and counsel for Sooner, stating that they had discussed the matter of producing the documents and, in substance, that the court would proceed to rule on the motions for summary judgment prior to compliance with the request for production. The difficulty for plaintiff is that the last paragraph of the letter stated that no production would be required as to any defendant who was dismissed on motion for summary judgment.[6] Not a single document had been produced The court granted summary judgment on April 28, 1971.

[6] "The intent of the Parties to said suit is that a Defendant with respect to which Plaintiff's suit is dismissed upon the Motions now before Judge Hill shall be required to produce nothing and object to nothing. Defendants with respect to which the Plaintiff's suit is not so dismissed shall comply with Plaintiff's Requests for Production of Documents and/or objects to all or part thereof in the manner stated above."

The question of foreclosing plaintiff by this letter addressed to his counsel is close. Out of an abundance of caution and to prevent a possible injustice, we conclude that Rule 56(f), F.R.Civ.P., is applicable in view of plaintiffs definite position, stated in writing by his counsel to the court, that he could not show interstate sales so as to support subject matter jurisdiction without being able to discover facts from the defendants, and his request to postpone adjudication until he could discover. Rule 56(f) provides:

> "Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

It is true that this representation was not in affidavit from by plaintiff in person but we think that the written representation by his lawyer, an officer of the court, is in the spirit of Rule 56(f) under the circumstances. Form is not to be exalted over fair procedures.

We thus vacate the summary judgments in favor of the defendants but with the following caveat. Shell has contended by affidavit that its gasoline sold in the Dallas area came from Texas refineries. American states that it acquired the gas which it sold to Sooner in Dallas, and in turn sold to Sooner in Texas as jobber. Without more it would appear from these statements that plaintiff will be hard put to show interstate sales but we

think that he should be given the opportunity to discover in an effort to make such proof. We hold however that his discovery must be limited in scope as follows: Plaintiff must first amend his complaint to specifically allege that at least one of the sales in question with respect to each defendant was in commerce, and his discovery must then be directed and limited to seeking proof in support of that jurisdictional allegation.

In addition to the alternative holding by the district court that plaintiff had no standing, discussed supra, there was another holding that plaintiff had failed to demonstrate injury. This holding was entirely premature and is vacated. The motions for summary judgment were limited to the subject matter jurisdiction question and, as has been stated, even these motions came on for disposition before plaintiff could have his day in discovery.

AFFIRMED in part; VACATED in part; REMANDED for further proceedings not inconsistent herewith.

BROWN, Chief Judge, concurring in part and dissenting in part:

I join in Judge Simpson's opinion and thereby Part III of Judge Bell's opinion. I would add only that whether the panel could have reversed the case in view of the prior Fifth Circuit decisions, those decisions are wrong and ought to be specifically overruled on the basis *Moore*.

SIMPSON, Circuit Judge, with whom BROWN, Chief Judge, WISDOM, GODBOLD and MORGAN, Circuit Judges, join, concurring in part and dissenting in part:

I adhere to the views and holdings of my opinion for Judge

Wisdom and myself, the majority of the panel by which this case was originally decided. *Littlejohn v. Shell Oil Company, et al.*, 5 Cir. 1972, 456 F.2d 225.

On that basis, I concur in Part III of Judge Bell's opinion for the en banc court, remanding this case to the district court to permit amendment to the plaintiff-appellant's complaint and to allow him additional discovery from the defendants-appellees for the purpose of developing proof of one or more discriminatory sales in interstate commerce.

On the same basis, viz: the views expressed in my original panel opinion, I respectfully dissent from Parts I and II of the en banc court's opinion by Judge Bell. I would continue to hold that Robinson-Patman[1] subject matter jurisdiction was present by virtue of the allegations of the amended complaint that Shell Oil Company, American Oil Company and Sooner Oil Company used profits from interstate gasoline sales to underwrite discriminatory intrastate price-cutting tactics employed against Littlejohn, the plaintiff-appellant, without requiring any allegations that one or more discriminatory sales were in interstate commerce. As stated in the panel majority opinion, I construe this to be the teaching of *Moore v. Mead's Fine Bread Company*, 1954, 348 U.S. 115, 75 S.Ct. 148, 99 L.Ed. 145.

CLARK, Circuit Judge, with whom GEWIN, THORNBERRY and INGRAHAM, Circuit Judges, join concurring in part and dissenting in part:

I concur without reservation in parts I and II of the majority

[1] § 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a).

opinion prepared by Judge Bell for the en banc court. I respectfully dissent from part III both because I believe it faults the district judge for what was a mistake in trial tactics which plaintiff now wants to second guess and because it undercuts Fed.R.Civ. P. 56.

Since Judge Coleman's dissent to the panel opinion deals in detail with the actions of counsel and the chronological context into which the procedural question is cast, it is unnecessary to do more here than touch the high spots. Plaintiffs only indication to the court that he needed to pursue discovery to defend against the motions for summary judgment was couched in the vaguest possible terms. It was contained in his initial responsive pleading to the motions and was in this language:

> Plaintiff would *suggest* that consideration by the Court of summary judgment motions at this early stage of the litigation is premature. The facts related to subject matter jurisdiction are certainly *not before the Court in any complete fashion.* Plaintiff has just recently initiated discovery with respect to jurisdictional facts by service on the Defendants of Requests for Production of Documents Related to Subject Matter Jurisdiction pursuant to F.R.C.P. 34. (Emphasis added)

Following this pleading all counsel reached an agreement which was cast into the form of a letter, *a copy of which was delivered to the court.* This letter agreement unqualifiedly provided that no discovery would proceed until after the court's rulings on the then pending motions for summary judgment

had been resolved. A copy of this letter is set out in the margin.[1] Suffice it to say that at least the trial court could

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[1]

Re: Agreement as to Time for Objecting to or Complying with Plaintiff's Requests for Production of Documents in CA-3-4195-D Littlejohn v. Shell Oil Company et al.

Gentlemen:

I am writing to set forth our agreement with respect to the Requests for Production of Documents ("Requests") pursuant to Fed. R. Civ. P. 34 served by the Plaintiff in the above styled and numbered cause upon Defendants Shell Oil Company, The American Oil Company and Sooner Oil Company in the latter part of February, 1971. As you know, all three Defendants in said Cause filed Motions for Summary Judgment and oral motions under Fed. R. Civ. P. 12(b) which are now pending before Judge Hill.

I have discussed the matters hereinafter set forth with each of you with the exception of James C. Hamill, Esq., attorney for Sooner. I have talked to Kenneth Mayfield, Esq., an attorney in Mr. Hamill's firm who is in contact with Mr. Hamill and who has confirmed that Mr. Hamill approves the terms of our agreement and that Sooner will comply therewith. Each of you and I agree to the following procedure as to the timing for objecting to and/or complying with the Requests of the Plaintiff:

1. If the Court overrules any of the three Defendants' Motions for Summary Judgment or motions under Fed. R. Civ. P. 12(b), thus leaving one or more Defendants before the Court in said Cause, then, each of such Defendants still before the Court after such ruling shall:

(a) File in writing any objections such Defendant may have to Plaintiff's Request for Production of Documents served upon it within seven (7) days after the entry of the Court's Order so overruling such Defendant's Motions; and

(b) With thirty (30) days after the entry of the Order so overruling such Defendant's motions, comply with Plaintiff's Request for Production of Documents with respect to all of the items enumerated in such Request which the Defendant does not object to within seven (7) days (as set forth above) in accordance with the Federal Rules of Civil Procedure.

2. If the Court sustains any of the Defendants' motions, thus dismissing Plaintiff's claims against the same so that such Defendant is no longer before the Court after such ruling, then the Defendant or Defendants so situated shall

reasonably have thought all counsel were then requesting that he proceed to rule on the summary judgment motions without awaiting the results of discovery.

Rule 56(f) is precise and unequivocal. A party who opposes a motion for summary judgment but cannot supply the factual basis for his opposition without the aid of discovery must make his problem known to the court by an affidavit. It is unnessary here to reach the issue as to whether 56(f) mandates that the showing be under oath, since the substance of what was initially disclosed was so equivocal, and since even this equivocation was wholly destroyed by the later agreement to forgo discovery. The plaintiff simply failed to comply with the spirit or the letter of this part of the Rule.

It well may be that a trial court might choose to overlook such a serious procedural shortcoming or a tactical agreement which hindsight has shown to be bad. Clearly, that court could determine that a just presentation of the issues of a particular case required further pursuit of discovery processes notwithstanding the fact that all counsel may agree not to follow such a course. However, no such broad prerogative properly appertains to an appellate court. Subject to rare exceptions calling for supervisory intervention (which does not extend to adjudging that

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be under no obligation or duty to comply with Plaintiff's Requests for Production of Documents in any manner.
The intent of the Parties to said suit is that a Defendant with respect to which Plaintiff's suit is dismissed upon the Motions now before Judge Hill shall be required to produce nothing and object to nothing. Defendants with respect to which the Plaintiff's suit is not so dismissed shall comply with Plaintiff's Requests for Production of Documents and/or object to all or part thereof in the manner stated above.

a trial court has abused its discretion when it does no more than honor an agreement of counsel to postpone discovery), this court's function is to correct the errors of judges not lawyers.

I would affirm every aspect of this case.

Supreme Court of the United States

October Term, 1973

NO. 73-568

RALPH H. LITTLEJOHN, JR.,
Petitioner,

v.

SHELL OIL COMPANY, SOONER OIL COMPANY, AND AMERICAN OIL COMPANY,
Respondents.

Supplement to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JAY M. VOGELSON
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IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-688

RALPH H. LITTLEJOHN, JR.,
Petitioner,

v.

SHELL OIL COMPANY, SOONER OIL COMPANY, AND AMERICAN OIL COMPANY,
Respondents.

Supplement to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Ralph H. Littlejohn Jr., Petitioner, respectfully files this Supplement to his Petition for Writ of Certiorari.

Subsequent to the printing of said Petition, the United States Courts of Appeals, Seventh Circuit, and Ninth Circuit, published opinions fundamentally inconsistent with each other and with the opinion of the Court of Appeals *En Banc* below. The opinions in *Copp Paving Co.* v. *Gulf Oil Co.*, ___ F.2d ___ (No. 72-2152, 9 Cir., Oct. 3, 1973) and *Mayer Paving &*

Asphalt Co. v. *General Dynamics Corp.*, __ F.2d __ (No. 72-1613, 7 Cir, Oct. 1, 1973) [Mr. Justice Clark sitting by designation], demonstrate further the abiding misunderstanding and conflicting applications of the Robinson-Patman Act, Section 2(a), and *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954).

1. The majority in *Mayer Paving* held that Section 2(a) jurisdiction is satisfied by interstate "underwriting" of purely local price discrimination in primary-line cases, such as *Moore* and *Littlejohn*, but is not satisfied in secondary-line cases. Justice Clark, in dissent, said that the underwriting concept applies to all Robinson-Patman Act cases, primary-line and secondary-line.

In *Mayer Paving*, the Court commented on the panel decision in *Littlejohn*:

> We do not find plaintiffs' reliance on *Littlejohn* v. *Shell Oil Co.*, persuasive. That case involved what one commentator has called "indirect primary-line competition," Case Comment, 37 *Minn. L. Rev.* 1035, 1040 n. 26 (1973). The Court was concerned with the "underwriting" theory found in the general language in *Moore*, discussed above. Here, there is no allegation that the buyers who allegedly received lower, non-justified prices were related to General Dynamics in any way similar to the manner in which gasoline stations were related to Shell Oil and American Oil in the *Littlejohn* case.

The Court thereupon ruled that the "interstate underwriting" concept described in *Moore, supra, was* a proper predicate for jurisdiction in primary-line cases, such as *Littlejohn*, but did not apply in secondary-line cases, such as was before the Court. Judgment was therefore rendered for General Dynamics.

Justice Clark strongly dissented. Justice Clark, in the same vein as Littlejohn has urged, said:

> This is the first dissent that I have filed in my several sittings with this Circuit, and it is, therefore, with regret that I find myself in disagreement here. However, the appellant, Mayer Paving and Asphalt Company, has been deprived of a $498,204.00 verdict and judgment by the granting of a motion *non obstante veredicto*, and, in my judgment, the sole ground for such precipitous action is entirely unsupportable. Indeed, if finally sustained, it will operate as a repealer of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a) (1970), and will severely restrict the holding in *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954).

While the majority recognized the *Moore*, *supra*, mandated application of the "underwriting" concept to primary-line cases, Justice Clark vigorously added:

> The majority also adopts the argument of General Dynamics that *Moore* v. *Mead's Fine Bread Co.*, *supra*, is inapposite because it involved primary competition between Moore and Mead. I find nothing in § 2(a) that limits its coverage to primary competition cases. On the contrary, the Act's purpose was to prevent all discriminatory pricing "where the effect of such discrimination may be substantially to lessen competition . . .". That interstate competition was substantially lessened in the particular geographical situation involved here is without peradventure; that the discriminatory pricing, in the words of § 2(a) "injured, destroyed or prevented" Mayer from competing with "customers" of General Dynamics located

> in Indiana was found to be true by the jury and was embodied in the judgment entered by the court and now set aside. Section 2(a) says nothing about "primary" or "secondary" lines of competition. Its intent, as stated by its manager, Congressman Utterback, was to condemn all discriminatory pricing "injuring" interstate commerce. To distinguish this case on technical differences between primary and secondary competition is but an arbitrary distinction entirely without a difference on these facts. Rather than excepting from § 2(a) the customers of the seller — as the majority does unless they are competing with one another — for the purposes of determining the presence of interstate commerce — § 2(a) *specifically* includes them and in the peculiar factual situation here requires, insofar as commerce is concerned, no proof of existing competition among the customers of the same seller. When it comes to the assessment of damages, competition might be crucial. While the factual situation was different in *Mead's Fine Bread*, where the interstate operation afforded a treasury for destroying local competition, the thrust of *Mead's Fine Bread* also covers this case. Indeed, in *Mead* it was admitted that the Act covered situations where "interstate commerce is in some other way used to destroy competition or is injured or impaired by a result of unlawful acts." 348 U.S. 115, 119. Here interstate commerce was used and unlawful acts were perpetrated in a continuous pattern for over ten years in sales made in interstate commerce that not only lessened competition but injured, destroyed or prevented Mayer from competing.

Thus, under the views expressed by both the majority and Justice Clark, Littlejohn satisfied the jurisdictional requirement.

Mayer Paving is in direct conflict with the *en banc* decision below in *Littlejohn.*

2. In *Copp Paving*, the Ninth Circuit distinguished the *en banc* decision in *Littlejohn.* The Court held that, while delivery of goods purchased must ordinarily cross State lines, it is not so required when there is some other nexus with an "instrumentality of interstate commerce."

Copp Paving is a consolidated proceeding, referred to as the Western Liquid Asphalt cases, brought under the Sherman, Clayton and Robinson-Patman Acts. The Court considered the Robinson-Patman Act jurisdictional matter after holding that the sales of asphalt affected "commerce", for Sherman Act purposes, because the asphalt was used on interstate highways.

The Court noted that defendants "process California-produced materials and deliver all of their product to California construction sites." Nevertheless, it was concluded that the "purchases . . . in commerce" Robinson-Patman Act jurisdictional requirement was satisfied. The Court said:

> Plaintiffs asserted claims under the Clayton and Robinson-Patman Acts as well as under the Sherman Act. Section 3 of the Clayton Act prohibits tying arrangements by "any person engaged in commerce." For there to be jurisdiction under the Clayton Act § 7, both the "acquired" and the "acquiring" companies must be "in commerce." Robinson-Patman price discrimination jurisdiction depends on the sales involved, as well as the selling company being "in commerce." Defendants argue that the "in commerce" requirements of these statutes are satisfied only by sales which cross state lines. While recognizing that this position has recently been adopted by another circuit with respect to the Robinson-Patman Act, it

> should be noted that the court there did not consider, because the facts did not require it to, whether this state-line test also applies to sales of a commodity (such as asphalt used in the construction of interstate highways) which is itself closely linked to an instrumentality of interstate commerce. *See Littlejohn v. Shell Oil Co.*, 42 U.S.L.W. 2114 (5th Cir. Aug. 10, 1973) (en banc). *We see no reason why sales which are "in commerce" because of their nexus with an instrumentality of interstate commerce must also satisfy a state-line test of "in commerce."* To be sure, the statutory language of the Clayton and Robinson-Patman Acts is not as broad and flexible as that of the Sherman Act. *Nevertheless, the fact that these acts were intended to supplement the purpose and effect of the Sherman Act supports a uniform interpretation of the "in commerce" requirement present in all three acts. See United States v. Philadelphia National Bank*, 374 U.S. 321 (1963); *Standard Fashion Co. v. Mangrane-Houston*, 258 U.S. 346 (1922). *See also* Conference Rep. H. R. Rep. No. 2951, 74th Cong., 2d Sess. (1936). Nor can we accept defendants' argument that the plaintiffs must show not only that the parties and sales are "in" commerce but must show that competition was injured before the Court has jurisdiction. This is the result of confusing the substantive with the jurisdictional requirements of the antitrust laws. It is not necessary for a plaintiff to prove his whole case in order to give the courts jurisdiction to hear it. [Emphasis added.]

Copp Paving therefore modified the "crossing State-line rule" so as to require its application *only* where there is no other link to an instrumentality of interstate commerce.

The result in *Copp Paving* was that Robinson-Patman Act

jurisdiction was held to exist even though no asphalt was delivered across State lines, a result fundamentally inconsistent with the result reached by the Fifth Circuit below.

CONCLUSION

It has been many years since the jurisdictional requirements of the Robinson-Patman Act were considered by the Supreme Court. In addition to the reasons for review mentioned in the Petition for Writ of Certiorari, there is a further need to reconcile the widening conflict among the Circuits.

Petitioner therefore prays that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

Original Signed By
JAY M. VOGELSON

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CERTIFICATE OF SERVICE

I, JAY M. VOGELSON, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Supplement to Petition for Writ of Certiorari on counsel for Respondents, by depositing same in the United States mails, postage prepaid, on November 2, 1973, addressed to William Simon, Esq., 1730 Pennsylvania Avenue, N.W., Washington, D.C. 20006 and D. L. Case, Esq., First National Bank Building, Dallas, Texas 75202, counsel for Shell; to Matthew J. Gallo, Esq., 910 South Michigan Avenue, Chicago,

Illinois 60680 and Khent H. Rowton, Esq., 2001 Bryan Tower, Dallas, Texas 75201, counsel for American; and to Charles H. Gullett, Esq., Citizens National Bank Building, Denison, Texas, counsel for Sooner.

Original Signed By
JAY M. VOGELSON

Jay M. Vogelson

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-688

RALPH H. LITTLEJOHN, JR., *Petitioner*,

v.

SHELL OIL COMPANY, SOONER OIL COMPANY AND AMERICAN OIL COMPANY, *Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-688

RALPH H. LITTLEJOHN, JR., *Petitioner,*

v.

SHELL OIL COMPANY, SOONER OIL COMPANY AND AMERICAN OIL COMPANY, *Respondents.*

On Petition for WRIT of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The citations to the opinions below are adequately set forth in the Petition (Pet. 2). The en banc opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. D) is now reported at 483 F.2d 1140.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition (Pet. 2).

QUESTIONS PRESENTED

Whether the en banc decision below remanding this matter to the trial court for petitioner to file an amended complaint and engage in discovery of basic jurisdictional facts correctly held that the jurisdictional language of Section

2(a) of the Clayton Act[1] expressly requiring that at least one of the two sales complained of as constituting a price discrimination must be in interstate commerce cannot be disregarded; and that federal jurisdiction cannot be assumed merely because a complaint alleges that a price discrimination was subsidized by interstate profits from sales unrelated to the local intrastate price discrimination which plaintiff alleges caused him injury.

Whether a non-final order remanding this case to the district court for discovery of basic jurisdictional facts involving a legal question upon which there is no direct conflict of decisions and upon which this Court has consistently denied certiorari warrants review by this Court.

STATUTE INVOLVED

Section 2(a) of the Clayton Act (15 U.S.C. § 13(a)), as amended by the Robinson-Patman Act, provides, in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them[.]

STATEMENT OF THE CASE

This is a private antitrust action involving alleged violations of the Robinson-Patman Act. Petitioner operated a private brand retail service station in Garland, Texas, a

[1] 15 U.S.C. § 13(a), hereinafter sometimes referred to as "Section 2(a)" or "Robinson-Patman Act."

suburb of Dallas, Texas. The complaint alleged that respondents each sold gasoline to a single Shell Oil Company ("Shell") and a single American Oil Company ("American") gasoline station in Garland, Texas, within one-half block of petitioner's station at wholesale prices lower than the prices they charged all other Shell and American retail service stations in the Northeast Dallas, Texas, area. The complaint also alleged that respondents each sold gasoline at one service station in Garland, Texas, one-half block from petitioner's station, at retail prices lower than were charged at other retail service stations in the Garland, Dallas County, Texas, area. [2]

Petitioner began operating his retail service station in September of 1969, and filed the present lawsuit in September of 1970 (R. 1, 26). The amended complaint alleged with precision the net profit petitioner made during the year he operated the station:

> . . . [T]he operation of said service station at 410 S. Plano Road was very successful to Plaintiff; at said location he realized a profit beginning the first full month of operation and continued to make a profit each and every month thereafter through the month of August, 1970; during said first year's operation Plaintiff realized a net profit of $11,257.41 from his station at 410 S. Plano Road. (R. 26).

Nothing in this record supports the statement in the Petition that actions by respondents made petitioner a "bankrupt" or that his business was "destroyed." (Pet 5).

Respondents' answers to the original complaint challenged subject matter jurisdiction on the ground that none of the sales transactions complained of as constituting price discrimination was in interstate commerce as required by

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[2] The Petition refers to respondents' "controlled" service stations adjacent to petitioner's station (Pet. 5, 6). The amended complaint contains no allegation that those stations were "controlled" by respondents. The trial court specifically held that petitioner had failed to show that respondents controlled the retail prices at the two stations within one-half block of petitioner's station (Pet. App. A at 21).

Section 2(a). The district court granted petitioner leave to file an amended complaint which alleged with greater particularity that the precise sales complained of by petitioner, both the higher price and the lower price said to constitute the discrimination, were sales of gasoline to retail service stations in Northeast Dallas, Texas, near and adjacent to the City of Garland, Texas, where petitioner's station was located (R. 27-29). The amended complaint contained no allegation that the gasoline delivered to the Shell and American stations in the Northeast Dallas area had moved in interstate commerce or that at least one of the sales complained of was in interstate commerce. Petitioner did allege that profits of Shell and American, derived from their interstate operations unrelated to the sales in this action, were used by each of them to support lower priced sales of gasoline to the two stations near petitioner (R. 29-30).

Respondents filed motions for summary judgment to dismiss the action for failure to satisfy the "in commerce" requirement of Section 2(a). Respondent Shell submitted affidavits establishing that all gasoline involved in the sales complained of as to Shell had been refined, transported, stored and delivered wholly within the State of Texas (R. 44-45).[3] Affidavits submitted by respondents American and Sooner Oil Company ("Sooner") demonstrated that all gasoline involved in the sales complained of as to those respondents was acquired by American in Dallas, Texas, and sold by American to Sooner in Dallas, Texas. Sooner, as American's wholesale distributor, sold the gasoline to retail service stations wholly within the State of Texas (R. 37, 39). No affidavits were submitted by petitioner in opposition to respondents' motion for summary judgment, as required by Rules 56(e) and 56(f) of the Federal Rules of Civil Procedure. Petitioner's memo-

[3] The Petition contains the phrase "Although the gasoline was produced or refined elsewhere, and always predestined for the Dallas market . . . ." (Pet. 10). There is nothing in the record to support the inference that the gasoline involved in the sales transactions complained of was refined outside the State of Texas and transported into Texas across state lines (*See* R. 44-45).

randum opposing the summary judgment motions requested that judgment be deferred until petitioner was able to engage in discovery of basic jurisdictional facts. However, petitioner's counsel agreed by letter that no discovery would proceed until after the court's rulings on the pending motions for summary judgment had been resolved (Pet. App. D at 56-58).

The district court granted respondents' motions for summary judgment (Pet. App. A at 17-22). The court noted the absence of any allegation that any gasoline sold by Shell or American to retail stations in the Northeast Dallas area crossed state lines and held that the allegation of interstate underwriting of the local intrastate sales did not satisfy the "in commerce" language of Section 2(a) (Pet. App. A at 19-20).

Petitioner appealed to the Fifth Circuit to review whether the district court erred in granting summary judgment while petitioner's discovery of jurisdictional facts was pending and incomplete. His prayer for relief was as follows:

> Based on the foregoing, Littlejohn prays that his right to conduct discovery in order to meet his burden of proof be vindicated, and that the judgment of the District Court be reversed.[4]

The Fifth Circuit, with Judge Coleman dissenting, reversed the district court stating:

> We simply hold that the district court acted prematurely in foreclosing the plaintiff from further discovery regarding the interstate aspects of the defendants' operations, from the only meaningful source of such discovery, the defendants' records. (Pet. App. B at 32).

The majority also ruled that petitioner's amended complaint conferred jurisdiction on the district court because the complaint alleged that the local intrastate sales were

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[4] Petitioner's opening brief on appeal to the Fifth Circuit Court of Appeals at 30.

subsidized by profits from interstate activities (Pet. App. B at 31).

Respondents filed a petition for rehearing en banc on the ground that unless one of the two sales alleged to constitute the discrimination was in interstate commerce there is no federal jurisdiction under Section 2(a). A rehearing en banc was ordered, and the parties were permitted to brief fully the jurisdictional issue. The rehearing carefully reviewed the record and considered all factual and legal contentions of the petitioner.

The en banc opinion affirmed the ruling of the district court that it was without subject matter jurisdiction under Section 2(a). The statutory requirement that at least one of the sales involved in the alleged discrimination must have been in interstate commerce was considered by the en banc panel to be "the sine qua non of subject matter jurisdiction" in a Section 2(a) action (Pet. App. D at 49). The en banc opinion agreed with petitioner that the discovery proceedings were "truncated, albeit inadvertently" by the judgments of dismissal (Pet. App. D at 44). The summary judgments dismissing the action were vacated, and the matter was remanded to the trial court with directions that petitioner amend his complaint to allege specifically that at least one of the sales in question with respect to each respondent was in interstate commerce. The en banc opinion further directed that petitioner be permitted to engage in discovery to prove that jurisdictional allegation (Pet. App. D at 54).

ARGUMENT

The En Banc Decision Was Correct and Presents No Important Federal Question or Direct Conflict of Decisions

The Petition contains the identical arguments which petitioner presented and lost in the en banc rehearing in the Court of Appeals. The en banc decision was consistent with all applicable precedents of this Court and lower courts, all of which have uniformly upheld the express statutory language of Section 2(a). This Court has con-

sistently denied certiorari in every case which has held that a sale across a state line is a prerequisite for an action invoking federal jurisdiction solely upon that antitrust statute. As recently as last year in *Belliston* v. *Texaco, Inc.*, 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972), this Court denied certiorari from a final judgment, after trial, that dismissed a Robinson-Patman price discrimination claim involving allegedly discriminatory intrastate gasoline sales confined to the Salt Lake City, Utah, area. The Court of Appeals held that the district court lacked jurisdiction over the Robinson-Patman claim where none of the sales complained of as constituting the price discrimination was in interstate commerce. The wholly intrastate character of the sales complained of in *Belliston* v. *Texaco, Inc.*, is indistinguishable from that alleged in the present case. *Littlejohn*, like *Belliston*, presents no substantial or important federal question. The considerations against granting certiorari in the present case are even more compelling than those presented in *Belliston* because in the instant case the Fifth Circuit has entered a non-final interlocutory order remanding the case to the trial court for further proceedings.

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, is a unique antitrust statute in that it contains three separate requirements as to "commerce"[5] which place precise limitations upon a federal court's jurisdiction. The jurisdictional requisites of a Section 2(a) action are clearly set forth in the words of the statute:

> It shall be unlawful for any person [1] engaged in commerce, [2] in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, [3] *where either or any of the purchases involved in such discrimination are in commerce.* . . . (15 U.S.C. § 13(a)) (Emphasis added).

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[5] "Commerce" is defined as interstate and foreign commerce. *See* Section 1 of the Clayton Act (15 U.S.C. § 12).

Courts have consistently held that the plain statutory language means precisely what it says. The first requirement relates to businesses engaged in interstate commerce, the second to the "course" of commerce, and the third requires at least one of the allegedly discriminatory sales to be *in* interstate commerce. Since each of the three requirements must be satisfied, failure to allege that one of the discriminatory sales is in interstate commerce is dispositive of the issue of subject matter jurisdiction.

The Fifth Circuit, en banc, correctly held that subject matter jurisdiction in an action brought under a federal statute stands or falls upon whether the complaint alleges the jurisdictional requisites of that statute. The en banc opinion adhered to the literal language of the statute and refused to consider the third jurisdictional element superfluous. In so doing, the Fifth Circuit followed canons of statutory interpretation generally applied by this Court. *See FTC* v. *Bunte Brothers*, 312 U.S. 349 (1941). In contrast, the statutory construction urged by the Petition would excise the express mandate of a sale "in commerce" and subvert the clear meaning of the words of the statute.[6]

The controlling principle of the threefold Section 2(a) jurisdictional test is that the "in commerce" language requires a Robinson-Patman Act complaint to allege that at least one of the two sales complained of as constituting price discrimination crossed a state line. That principle was enunciated in *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, 118 (1954), *rehearing denied*, 348 U.S. 932 (1955):

> Respondent is engaged in commerce, selling bread both locally and interstate. In the course of such business, it made price discriminations, maintaining the price in the *interstate* transactions and cutting the price in the *intrastate* sales. (Emphasis original).

This Court did not deviate from the jurisdictional language of Section 2(a) in *Moore* v. *Mead's Fine Bread Co.* This Court did not hold that a plaintiff seeking to invoke federal

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[6] *See* 86 Harv. L. Rev. 765 (1973).

jurisdiction in a Section 2(a) price discrimination action need not allege a sale "in commerce" to satisfy the statute's jurisdictional requirements.

The facts in *Moore* v. *Mead's Fine Bread Co.* met each of the three jurisdictional requirements of Section 2(a). The first two "commerce" requirements were satisfied by the fact that the sales prices in interstate commerce at Farwell, Texas, were maintained while the prices in intrastate sales to Santa Rosa, New Mexico, were drastically cut (*Ibid.* at 118). The third jurisdictional element, the "in commerce" requirement, was met when the Court recognized that one of the sales complained of as constituting price discrimination did in fact cross a state line and was, therefore, in interstate commerce:

> Respondent sells bread in Farwell, Texas, a town which it serves with a bread truck operating out of Clovis, New Mexico. (*Ibid.* at 116).

As pointed out by this Court, the facts in *Moore* v. *Mead's Fine Bread Co.* did indeed "read upon the words of the statute." (*Ibid.* at 120).

Since *Moore* v. *Mead's Fine Bread Co.*, the rule that a Section 2(a) action must allege that one of the two sales complained of as constituting price discrimination crossed a state line has been uniformly applied by the lower courts. The argument that language in *Moore* v. *Mead's Fine Bread Co.* supports jurisdiction in a Section 2(a) action if the price cutting is financed by profits from multistate operations has been consistently rejected as being dicta to the Section 2(a) jurisdictional issue.[7] For example, in *Cliff*

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[7] Words entirely unnecessary for the decision of the case are considered obiter dictum. As stated by this Court in *Kastigar* v. *United States*, 406 U.S. 441, 454-455 (1972):

> The broad language in *Counselman* relied upon by petitioners was unnecessary to the Court's decision, and cannot be considered binding authority.

Food Stores, Inc. v. *Kroger, Inc.*, 417 F.2d 203, 209 (5th Cir. 1969), the court stated:

> There is language in the *Mead's Fine Bread* case that may be read as supporting appellant's argument. Mr. Justice Douglas was concerned about large interstate enterprises waging local price wars with war chests filled with interstate booty. In *Mead's*, however, one of the discriminatory sales, the profits from which subsidized the local price-cutting campaign, was 'in commerce' within the meaning of the Act. . . . *And since* Mead's Fine Bread, *the critical language in the statute has been repeatedly construed to mean that the seller must not only be engaged in interstate commerce, but that one of the discriminatory sales must be in interstate commerce.* (Emphasis added; citations omitted).

The decision in *Moore* v. *Mead's Fine Bread Co.* was analyzed anew in the Fifth Circuit's en banc opinion below. The Court of Appeals carefully noted that the third jurisdictional element, the critical "in commerce" requirement, was satisfied in that case, and provided the following perspective:

> *Moore* v. *Mead's Fine Bread* is a landmark case in that it explicated the coverage of § 2(a) to protect the competitor of a purchaser who purchased from one seeking to destroy the competitor by price cutting. *The case did not, however, alter or extend the specific jurisdictional requirements of § 2(a).* (Emphasis added) (Pet. App. D at 50).

Lower court decisions analyzing Section 2(a) have consistently required that the "in commerce" requirement be satisfied to confer federal jurisdiction. The cases need not be discussed individually. A footnote citation suffices to demonstrate the uniformity of lower court decisions on this question.[8]

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[8] *See Mayer Paving & Asphalt Co.* v. *General Dynamics Corp.*, 1973-2 Trade Cas. ¶ 74,719 (7th Cir. 1973), *petition for cert. filed*, 42 U.S.L.W. 3257 (U.S. Oct. 19, 1973) (No. 73-671); *Lehrman* v. *Gulf Oil Corp.*, 464 F.2d 26 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972); *Belliston* v. *Texaco, Inc.*, 455 F.2d 175 (10th Cir.), *cert.*

This Court has denied certiorari in each of the eight petitions presented after *Moore* v. *Mead's Fine Bread Co.* in cases where lower courts have held that the express "in commerce" language in Section 2(a) means that at least one of the sales complained of as constituting the alleged price discrimination must have crossed a state line. *Belliston* v. *Texaco, Inc.*, 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972); *Willard Dairy Corp.* v. *National Dairy Products Corp.*, 309 F.2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934, *rehearing denied*, 375 U.S. 871 (1963); *Jones* v. *Metzger Dairies, Inc.*, 334 F.2d 919 (5th Cir. 1964), *cert. denied*, 379 U.S. 965 (1965); *Foremost Dairies, Inc.* v. *FTC*, 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965); *Cream Crest-Blanding Dairies, Inc.* v. *National Dairy Products Corp.*, 370 F.2d 332 (6th Cir.), *cert. denied*, 387 U.S. 930 (1967); *Abramson* v. *Colonial Oil Co.*, 390 F.2d 873 (5th Cir.), *cert. denied*, 393 U.S. 831 (1968); *Hiram Walker, Inc.* v. *A & S Tropical, Inc.*, 407 F.2d 4 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969); *Walker Oil Co.* v. *Hudson Oil Co.*, 414 F.2d 588 (5th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970).

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denied, 408 U.S. 928 (1972); *Walker Oil Co.* v. *Hudson Oil Co.*, 414 F.2d 588 (5th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970); *Hiram Walker, Inc.* v *A & S Tropical, Inc.*, 407 F.2d 4 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969); *Abramson* v. *Colonial Oil Co.*, 390 F.2d 873 (5th Cir.), *cert. denied*, 393 U.S. 831 (1968); *Food Basket, Inc.* v. *Albertson's, Inc.*, 383 F.2d 785 (10th Cir. 1967); *Cream Crest-Blanding Dairies, Inc.* v. *National Dairy Products Corp.*, 370 F.2d 332 (6th Cir.), *cert. denied*, 387 U.S. 930 (1967); *Foremost Dairies, Inc.* v. *FTC*, 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965); *Borden Co.* v. *FTC*, 339 F.2d 953 (7th Cir. 1964), *rev'd on other grounds*, 383 U.S. 637 (1966); *Willard Dairy Corp.* v. *National Dairy Products Corp.*, 309 F.2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934, *rehearing denied*, 375 U.S. 871 (1963); *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.*, 287 F.2d 265 (7th Cir.), *cert. denied*, 368 U.S. 829 (1961); *Izumi* v. *Shell Oil Co.*, 1973 Trade Cas. ¶ 74,274 (N.D. Cal. 1972); *Country Maid, Inc.* v. *Hascotes*, 324 F.Supp. 875 (E.D. Pa. 1971); *Flotken's West, Inc.* v. *National Food Stores, Inc.*, 312 F.Supp. 136 (E.D. Mo. 1970); *Liquilux Gas Services, Inc.* v. *Tropical Gas Co.*, 303 F.Supp. 414 (D.P.R. 1969); *Baldwin Hills Building Material Co.* v. *Fibreboard Paper Products Corp.*, 283 F.Supp. 202 (C.D. Cal. 1968); *Ingram* v. *Phillips Petroleum Co.*, 259 F. Supp. 176 (D.N.M. 1966).

The repeated denials of certiorari in cases where *Moore* v. *Mead's Fine Bread Co.* has been confined to its Section 2(a) jurisdictional facts led the Tenth Circuit (the court from which the *Moore* appeal was taken) to state in *Food Basket, Inc.* v. *Albertson's, Inc.*, 383 F.2d 785, 787 (10th Cir. 1967):

> It seems safe to assume that if the post-Meade [sic] Bread case law is contrary to the language used there, the Supreme Court would have corrected the misinterpretation on repeated applications for certiorari. We take the statute to mean what it says, i.e., that at least one of the discriminatory sales complained of must be in commerce.

Petitions for certiorari on this same issue have been filed in five of the last six years, each one having been denied. The instant petition is yet another attempt to have this Court review a decision that presents no special or important federal questions and upon which the lower courts have been consistent in following the language of the statute and the jurisdictional facts in *Moore* v. *Mead's Fine Bread Co.*

The Supplement to Petition for writ of certiorari incorrectly argues that recent circuit decisions are in direct conflict with the en banc opinion below. In *Mayer Paving & Asphalt Co.* v. *General Dynamics Corp.*, 1973-2 Trade Cas. ¶ 74,719 (7th Cir. 1973), *petition for cert. filed*, 42 U.S.L.W. 3257 (U.S. Oct. 19, 1973) (No. 73-671), the majority stated that the "in commerce" jurisdictional language of Section 2(a) requires that one of the sales complained of as constituting price discrimination must cross a state line. (1973-2 Trade Cas. at 95,160 - 95,161). In that case there was an allegation of interstate sales by defendant from Illinois into Indiana at prices lower than the intrastate sales in Illinois (*Id.*). The court carefully noted that its decision was wholly consistent with the en banc opinion in the instant case, stating in a footnote to a citation to the original panel's opinion in *Littlejohn:*

> Subsequent to the time that the drafting of this opinion was completed and the opinion had been circulated, this court learned that the Fifth Circuit, *en*

banc, had vacated the earlier panel opinion insofar as it indicated a lack of necessity for at least one discriminatory interstate sale. 42 U.S.L.W. 2114 (August 10, 1973). In the present opinion, we had found *Littlejohn* as originally written not dispositive. The superseding *en banc* opinion, of course, strengthens the result reached by the opinion in the present case before this court. Since we have reached the result we did irrespective of the original *Littlejohn* opinion, we have not deemed it necessary to revise the references in our opinion to the original opinion nor to refer further to the *en banc* opinion other than noting that it supports the result we have reached. (1973-2 Trade Cas. at 95,162 n. 3a).

Mr. Justice Clark (sitting by designation) dissented on the ground that plaintiff, doing business in Illinois, *did* compete with an Indiana company, although competition "across the border in Indiana" was hindered because of the higher charges extracted from it by defendant (1973-2 Trade Cas. at 95,167). Neither the majority nor the dissenting opinion holds or suggests that the "in commerce" jurisdictional requirement of Section 2(a) should be disregarded.

The decision in *Copp Paving Co.* v. *Gulf Oil Corp.*, 1973-2 Trade Cas. ¶ 74,732 (9th Cir. 1973), does not represent a direct conflict with the en banc opinion in *Littlejohn*. That case involved allegations of violations of a number of antitrust laws, the Sherman, Clayton and Robinson-Patman Acts (15 U.S.C. §§ 1, 2, 13(a), 14 and 18). The Court of Appeals found that the sales of asphalt involved did affect interstate commerce sufficiently to establish Sherman Act jurisdiction and then found that the production of asphalt for use in interstate highways placed the asphalt producers in interstate commerce. The court acknowledged the "state line test" in actions pursuant to Section 2(a) but felt an exception should be made where the particular commodity involved (asphalt) was used in creating the instrumentality of interstate commerce (interstate highway construction). The *Littlejohn* en banc decision was distinguished on its facts. The opinion by the Ninth Circuit Court of Appeals,

even if correct, is unique to the facts of that case, and does not present a direct conflict of decisional law on the "in commerce" jurisdictional requirement of Section 2(a).

Congress has determined that price discriminations involving solely intrastate sales are beyond the scope of the Robinson-Patman Act. Where, however, the product involved in the sales complained of as discriminatory has crossed a state line and thus was "in commerce," the jurisdictional requirements of the Act are satisfied. In *Bargain Car Wash, Inc.* v. *Standard Oil Co.*, 466 F.2d 1163 (7th Cir. 1972), gasoline had been refined in states other than Illinois and later transported into Illinois in the course of the sales complained of as discriminatory. Mr. Justice Clark (sitting by designation) accordingly concluded that the gasoline sales involved were "well within the jurisdictional requirement of the Act." (*Id.* at 1166). Where facts are alleged and proved which establish that either or any of the sales complained of are "in commerce," courts have fully applied the provisions of the Robinson-Patman Act. If a more pervasive commerce coverage is to be fashioned for that Act, the argument should be addressed to Congress, not this Court.

The present Petition seeks a writ of certiorari from a Court of Appeals order which was not a final judgment against this petitioner. The en banc opinion was essentially an order dismissing the amended complaint, not the action, with both leave to amend and the opportunity to engage in discovery of basic jurisdictional facts. A petition for certiorari must present an extraordinary issue of general importance to warrant review of a non-final order. This Court has denied certiorari because of the non-finality of an order remanding the case to the trial court. *See*

Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251 (1915). In the present case, the Court of Appeals order has given petitioner the opportunity to resolve the very issue that is the subject of this Petition. Petitioner has never contended that he would be unable to establish the requisite sale across state lines. He has always argued for the precise result granted him by the en banc decision—the opportunity to conduct full discovery to uncover basic jurisdictional facts known to respondents.

Piecemeal appeals are not favored by this Court. The preferred procedure is for petitioner to follow the remand instructions from the Court of Appeals and pursue discovery to develop a full factual record on the character of the sales transactions involved in this complaint. Further trial proceedings may well enable petitioner to satisfy the "in commerce" requirement by identifying and proving that one of the sales complained of as constituting price discrimination crossed state lines, thus avoiding Supreme Court review of the issue presented in the instant Petition.

CONCLUSION

The practice of this Court has been to grant writs of certiorari only in cases involving either principles of fundamental importance to the general public or a direct conflict in circuit court opinions. Respondents respectfully submit that the instant Petition presents no important question of federal law and no conflict of decisions calling for settlement by this Court. The Court of Appeals order dismissing the amended complaint simply measured the complaint allegations against the explicit jurisdictional

language in Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. The order remanding the case to the district court grants petitioner the further opportunity to file a second amended complaint and engage in discovery to establish the basic jurisdictional facts required by the explicit language of the statute. The Petition for writ of certiorari should be denied.

Respectfully submitted,

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